UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. GIZACHEW WONDIE, Defendant.	CASE NO. CR18-315-RAJ Seattle, Washington June 22, 2021 9:00 a.m. *FRANKS* HEARING Part 2 of 2

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE RICHARD A. JONES
UNITED STATES DISTRICT JUDGE

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PROCEEDINGS

THE COURT: Good morning, please be seated.

THE CLERK: We are here in the matter of the United States versus Gizachew Wondie, Cause No. CR18-315, assigned to this court.

Counsel, please make your appearances for the record.

MS. BECKER: Good morning, Your Honor. Erin Becker for the United States, alongside co-counsel Jim Oesterle. Also Jordan Clark will be present periodically. Thank you.

THE COURT: Good morning.

MR. HAMOUDI: Good morning, Your Honor. Mohammad Hamoudi, along with Sara Brin and Patricia Stordeur from the Federal Defender's Office. We're joined by our investigator, Michael Stortini, Mr. Gizachew Wondie and his family.

THE COURT: Good morning, all of you.

As we closed business yesterday, there was an issue that appeared to have been unresolved. Did the parties work out their differences?

MR. HAMOUDI: We're going to put on Mr. Noedel's testimony, Your Honor, and if the government has objections as he's testifying, we can address them on an ongoing basis.

THE COURT: All right. If that's satisfactory, I believe we had him identify himself by name, and we had an objection shortly after that, so I think we can pick up from

there, counsel.

MATTHEW NOEDEL,
having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HAMOUDI:

Q. Mr. Noedel, good morning.

A. Good morning.

Q. Can you tell us a little bit about your background, sir?

A. Yes.

So I've been working in forensic science for over 30 years. I started with a private toxicology company in California, where I worked for three years before coming to the Washington State Patrol Crime Laboratory.

In 1990, I went into the crime laboratory working as a chemist and trace evidence and microscopy analyst, and so I was studying small particles and doing drug analysis, as well as responding to crime scenes.

In about the first five years of my employment with the State Patrol, I transferred into the Firearm and Toolmark Examination Unit, where I worked for the next 10 years.

After a total of 15 years at the Washington State Patrol Crime Laboratory, I started my own consulting business called Noedel Scientific, and I've been working as an independent consultant in forensic analysis for the past 16 years beyond my time with the State Patrol.

In support of that career path and profession, I'm a member of a number of professional organizations; one important one is called AFTE, A-F-T-E, which stands for the Association of Firearm and Toolmark Examiners. I'm a distinguished member of that organization and the former editor of the scientific journal that we produce.

That organization is an association of about a thousand practicing firearm examiners, and we study the microscopic features that are connected to comparing and identifying firearms, cartridge cases, projectiles, bullets, and studying the performance of all of those components. Anything that can be connected to the discharge of firearm may come the way of a firearm and toolmark examiner like myself.

I am certified by that organization in firearms, toolmarks, and gunshot-residue analysis. I'm also, I may have mentioned, a distinguish member of that organization.

Beyond that, I'm a member of number of professional organizations. I participate in standardization committees within the field of forensic science, and continue to work in those capacities annually and throughout my career.

And so that's a nutshell of my short, short resumé.

Q. Thank you.

Did you prepare a declaration that was, in this particular case -- in Mr. Wondie's case, after reviewing materials that were provided to you?

A. Yes, I did.
Q. Okay. Do you stand by that declaration?
A. I do.
Q. Okay.
MR. HAMOUDI: At this point, marked for identification Exhibit 170 and move to admit it, Your Honor.
THE COURT: Any objection?
MS. BECKER: No, Your Honor. Thank you.
THE COURT: It's admitted.
(Exhibit 170 admitted.)
Q. (By Mr. Hamoudi) I want to focus in this declaration on a couple of topics. Under the heading, "NIBIN program description," you discuss -- you say the following: "Because the computer may return false positive associations, any computer suggestion must be evaluated by direct microscopic examination of the actual cartridge cases. This exam must be conducted by a trained firearm and toolmark examiner."
Do you see that?
A. I do.
Q. Can you explain to us what is a false positive?
A. So in terms of the NIBIN program, the computer association program, a false positive would be any time the computer suggests that two items have similarities, but, in fact, we, during direct examination, find that they are not, in fact, associated and not from a common source.

So, in general, a false positive is when an examination returns the wrong results, it's the wrong answer, but it says two things are associated. So it claims a positive association, but in further testing, that turns out to be not true, and that's what a false positive is, in terms of a NIBIN comparison. So when the computer suggests a correlation that is proven to be false in direct exam.

Q. What is the significance of a false-positive association in your training and experience?

A. False positives are a very dangerous condition in any forensic discipline because it indicates that the wrong association has been made, and then, of course, a wrong association can be carried through into legal proceedings and potentially harm someone's life and liberty if falsely associated with a particular event.

Q. In your declaration, you state, "The NIBIN administration placed an emphasis on obtaining fast results." Do you remember that?

A. Yes, I do.

Q. Can you talk to us about the idea of obtaining fast result in the context of your training and experience with respect to your discipline of firearm examination?

A. In general, firearm and toolmark comparisons and identifications are not something that should be rushed, and so I'm also concerned when the emphasis is put on the speed of

analysis rather than the correct analysis or the thoroughness of analysis.

When we take shortcuts in forensic evaluations, it tends to create mistakes, and mistakes are not acceptable in the level of work that we are providing to the legal community.

Q. I want to ask you a hypothetical.

You reviewed the NIBIN lead in this case, correct?

A. Yes.

Q. The NIBIN lead involved -- we can bring up Exhibit 135. Do you remember this document, this NIBIN lead?

A. Yes, I do.

Q. And in this document, it describes three exhibits, correct?

A. Yes, it does.

Q. Okay. And hypothetically speaking, as a hypothetical, if Exhibit 7164651-1TF was discarded shortly after the test-fire, what is the forensic significance of that event?

A. So the significance of having that component discarded means unless a confirmation by a trained microscopist has already been completed, that it can't be completed until a test-fire is generated.

The destruction of the test-fires means that we cannot confirm or refute the computer's suggestion that is offered on this lead notification.

MR. HAMOUDI: I have no other questions, Your Honor. Thank you.

THE COURT: Cross-examination?

MS. BECKER: Thank you.

CROSS-EXAMINATION

BY MS. BECKER:

Q. Mr. Noedel, before we get very far, I want to ask you some questions about terminology, to make sure that we're on the same page.

A. Sure.

Q. And they're specific to NIBIN.

First, am I correct that the word "acquisition" is used to describe the process of a technician inputting a casing into an instrument so that it can be thoroughly photographed?

A. Yes. Acquisition is the process of a technician acquiring the data, inputting the data.

Q. And by "the data," we're talking about high-definition imaging, correct?

A. Yes. The computer takes images. The operator also puts the names and the calibers and the qualifying information, and then the computer takes the high-definition photographs connected to that input.

Q. And then the next step for would be for that image and data that's been acquired to put into the database of images; is that correct?

A. Correct. During the acquisition process, all that information is stored and put into the computer database.

Q. All right.

Then there's the word "correlation," and I'm understanding from your report that a correlation is a comparison of two images believed to be -- I guess "belief" is the wrong word if we're talking about a computer -- but images generated by a computer as a potential match.

A. Generally correct. Correlation is the process the computer uses to compare all of the images in the database that the user has defined. For example, a computer won't compare 9mm to .40 calibers.

So the collaboration process is the computer sorting through, and the correlation returns results whether there is actually a lead or a comparison, something worthy of comparison or not. It simply returns, during correlation, the things the computer thinks are best, and it provides a list of candidates --

Q. A rank list? I'm sorry. I didn't mean to cut you off.

A. A list of candidates to consider.

Q. And that's a ranked list?

A. Yes, it's a ranked list.

Q. All right. And the correlation review is the next step, and it would be technicians looking at the correlation suggested by the computer, looking at the imaging provided by the computer that was acquired to make an initial determination as to whether those correlations were appropriate.

A. Correct. The correlation review is the first human interaction after the computer has done its comparison. The correlation review is required because the computer will return more results than what could be declared a lead or an association.

So the operator, the technician has to sort through the computer offerings to narrow down what that operator feels might warrant further exams.

Q. And that conclusion, in order to generate a lead, must be confirmed by two technicians; is that correct?

A. Correct. The first technician reviews the correlation list offered by the computer. If that technician finds something that he finds interesting, that he feels there is an association, he can then send that to a second human to review the photographs that he's selected, and the second person can then review the correlation selected by the first person.

Q. And then if those two individuals agree with those correlations, they can generate what's called a lead notification, which is sent out to the investigators who are working on the cases that resulted in the input of images that have been correlated, correct?

A. Correct.

This is one of the processes that has been expedited. Once those two individuals agree that the photographs offered by the computer warrant further examination, they issue a lead

notification.

Because those two analysts do not have to look at the physical evidence directly, they're looking at photographs, they can do that process quickly and provide it to detectives or investigators quickly, before the confirmation process.

Q. And you've referred, just now, to the confirmation process, and that's the process of forensic scientists trained in toolmark and firearm examination, looking at not just the photographs and the images that have been acquired, but by looking at the actual casings under a microscope and comparing them?

A. Correct. The confirmation step is required, and it is the last step of the process, where a trained examiner can either agree with the association, or refute the association. And that's the step that is necessary so that we have a scientist who can consider all of the ins and outs of microscopic comparisons.

Q. Confirmation is also called a match?

A. Confirmation is not a match. If a computer suggestion is confirmed, it would be called, by the laboratory, an "identification." The crime laboratory and the Association of Firearm and Toolmark Examiners, we have three results: Identified, eliminated, or inconclusive. And so if an examiner compared the actual exhibits suggested by the computer and found them to be of common source, the word would be "identification."

The cartridge cases would be identified to each other.

Q. So you're telling us the word that a scientist would use under the NIBIN framework, "match" would be another word to describe a confirmation?

A. Confirmation can only exist when a firearms examiner has studied the exact specimens.

Q. I understand the definition of "confirmation," Mr. Noedel. What I'm asking you is, under the NIBIN framework and the NIBIN guidelines that the word "match" is commonly used to describe a confirmation as well.

A. In my experience, people use the word "match" to describe the associations pulled by the computer. So, yes, a technician may use the word "match" during their analysis of the event.

Q. And the word that is also used is "hit"; is that correct?

A. Yes.

Q. Now, I'm understanding you to say that the words "hit" and "match" are more appropriately associated with correlations and not confirmations; is that correct?

A. That's correct.

Q. So I see in your report that's been admitted as Exhibit 170 that you refer on page 6 to a document called, "Minimum Required Operating Standards for National Integrated Ballistic Information Network Sites"; is that correct?

A. Yes.

Q. Do you have a copy of that document in front of you?

A. I do not have that document with me.

MS. BECKER: Your Honor, I brought a copy of that document. May I approach Mr. Noedel and defense counsel to provide a copy?

THE COURT: You may. Do you have that copy electronically, counsel?

MS. BECKER: Unfortunately, I do not for today.

THE COURT: All right. Show it to counsel first.

MS. BECKER: I'm going to give them a separate copy.

THE COURT: Okay.

THE CLERK: This will be marked Exhibit 83.

Q. (By Ms. Becker) Do you have that document in front of you?

A. Yes.

Q. Is this the document that you were referring to on page 6 of Exhibit 170?

A. I believe it is. I'm looking at my reference. I just have it as "Government File 133576." The title is correct and matching.

So I pulled this from -- this reference from the Internet. So I'm going to assume that this is, in fact, the matching document that I reference in page 6.

Q. All right. And that is a document created by ATF?

A. Yes, it is.

Q. And it provides a list of definitions of terms?

A. Yes, it does.

Q. On page 3, there is the definition of a "NIBIN hit," correct?
A. Yes.
Q. And it defines "NIBIN hit" as "a result of two or more firearm ballistic acquisitions that have been confirmed as a match by a firearms examiner. NIBIN hits are based on correlation review of digital images using MatchPoint Plus and microscopic confirmation by a firearms examiner. This information and intelligence can be used for investigative purposes, and is suitable for court purposes."

Is that ATF's definition of a "hit"?
A. Yes.
Q. And then under ATF's definition, a "hit" and a "match" and a "confirmation" are all the same thing.
A. I disagree.
Q. You disagree that those are the words that are in the ATF's report?
A. I do not disagree with the words in the report. One of the elements that you read through reads, "and microscopic confirmation by a firearms examiner." A firearms examiner is someone who studies firearm and toolmark examinations as a profession, as stated in things like the AFTE guidelines.

So when you have the computer suggestions confirmed, microscopically confirmed by a firearms examiner, then you have intelligence that can be used for investigative purposes and is

suitable for court purposes.

So it's my interpretation that a microscopic confirmation by a firearm examiner is the confirmation process, the third element after correlation conducted by an actual scientist looking at the actual exhibits.

Q. And ATF defines that as a "NIBIN hit."

A. Yes; for example, in the same document --

Q. What I asked you was: They define it as a "NIBIN hit"?

A. Yes. A microscopic confirmation by a firearms examiner is a NIBIN hit.

Q. And they also call that a "match" in the same definition?

A. Yes, yes, they do call that a "match."

Q. So it seems there is some confusion between the terminology the ATF uses -- "hit," "match," and "confirmation" -- and what you understood is that "hit" and "match" are the same as a correlation?

A. Well, I disagree that there's confusion. It clearly says "microscopic confirmation." So, for me, "hit" and "match" are not confusing. This definition that you're citing specifically mentions a firearm examiner, which is also defined in this document.

Q. Thank you.

Mr. Noedel, I want to go back to talking about acquisition, correlation, and correlation review for a moment, if I could.

A. Sure.

MS. BECKER: Victoria, do we already have an Exhibit 80 and 81?

THE CLERK: Those numbers are reversed.

MS. BECKER: Thank you. Your Honor, I have two images that I'd like to mark as 80 and 81. May I approach?

THE CLERK: 79 and 80 are available.

MS. BECKER: I'll take 79 and 80, if I might.

THE COURT: Again, counsel, do you have these documents electronically?

MS. BECKER: I'm sorry, Your Honor, I do not.

THE COURT: Okay.

Q. (By Ms. Becker) Mr. Nobel, do you have in front of you Exhibits 79 and 80?

A. Yes.

Q. I want to just start by looking at Exhibit 80 for a moment, if I may.

A. Okay.

Q. Does this appear to be a photograph taken of a cartridge case?

A. This is, yes, the head-stamp area of a fired cartridge case.

Q. All right. And when we're talking about the acquisition of data by NIBIN, we're not talking about anything that looks like this in Exhibit 80, right?

A. Correct.

Q. This appears to be a photograph taken with an ordinary camera?
A. Yes.
Q. Turn to Exhibit 79. This also appears to be an image of a cartridge case; is that correct?
A. I believe this is two images placed side by side.
Q. Perfect.
And we're talking about the same general area that was in Exhibit 80, correct?
A. Yes. This appears -- well, this appears to be a magnification of the central portion of Item 80. That portion is called the primer, and this is a close-up image of the microscopic information on a primer.
Q. And Exhibit 79 better demonstrates the kind of precision -- precise images that the BrassTRAX, the instrument used to acquire images, produces?
A. Yes. It appears that the images on Exhibit 79 are images taken directly from the computer, and this is the type of detail and information that the computer returns for the technician to evaluate.
Q. All right. And you would agree that this photograph is exceptionally detailed, especially in comparison to Exhibit 80?
A. Yes. It is far more detailed than No. 80 and does contain useful detail.
Q. And you described for us that this, in fact, appears to be

two images side by side, and I see, if we're looking just at the photograph in the middle, kind of the white line vertically through the image, towards the left side?

A. Yes, if I could --

Q. Is the portion to the left of that white line one image, and the portion to the right another image?

A. Yes. So imagine that we're looking at 25 percent of the left image, the dividing line, and about 75 percent of the right image, and the dividing line separate -- they would be overlaid, and the dividing line lets us see both exhibits at the same time.

Q. And someone who is doing a correlation of review can move that white line to the left and to the right to see other parts of the two images side by side to assist in making that correlation review and generating a lead?

A. Yes, they can.

Q. And although not shown in this photograph, in addition, the examiner can manipulate the photograph to exaggerate the striations and grooves to get a better sense of whether they are, in fact, similar?

A. Yes. The technicians do have limited resources in tools to enhance and diminish contrast and lighting.

Q. And that helps them, more than just the naked eye does, determine whether a correlation and a lead is appropriate?

A. I'm not sure if I'm tracking properly. Ultimately --

Q. I'm happy to ask it a little bit differently.
A. Okay. Thank you.
Q. You would agree that this is far more detail than what we see just merely in Exhibit 80?
A. Yes, yes. This close-up image is much better --
Q. All right --
A. -- at --
Q. We've just been talking about images and photographs --
THE COURT: Counsel, let's slow down and not interrupt --
MS. BECKER: Thank you.
THE COURT: -- the witness --
MS. BECKER: I apologize.
THE COURT: -- so we have a complete record.
MS. BECKER: Thank you.
THE COURT: Start again.
MS. BECKER: Your Honor, I'd like to offer Exhibit 79 and 80 for illustrative purposes only.
THE COURT: Any objection?
MR. HAMOUDI: If only for illustrative purposes, Your Honor.
THE COURT: They're admitted for illustrative purposes.
(Exhibits 79 and 80 admitted.)
MS. BECKER: Thank you.

Q. (By Ms. Becker) I'm going to start with what's been admitted as the second page of Exhibit 136. Do you have that in front of you?
A. It's not on the computer yet.
Q. Better?
A. Yes, I see "USA page 7492" in the lower right.
Q. Yes, and you also see at the bottom right, "Defendant's Exhibit 136-2"?
A. Yes.
Q. All right. And at the top, this appears to be a document generated in 2016; is that correct?
A. That's correct.
Q. And it indicates that -- excuse me.
On the next page, 136-3, which has also been admitted into evidence, it attaches a NIBIN lead notification?
A. Yes. That's the title of the document.
Q. And it indicates that it's generated by the Washington State Patrol?
A. Yes, it does.
Q. And going back to the cover page, it indicates, "If a microscopic confirmation is required, please inform the State Patrol Crime Lab?
A. Yes.
Q. And it also indicates that not all leads require confirmation; is that correct?

A. That's correct.
Q. And, finally, on the last page of this document, on 136-4, it reads that "NIBIN leads cannot be utilized for the establishment of probable cause"?
A. Yes, it says that.
Q. And it also asks, "if a hit confirmation is needed"?
A. Yes, that is posed.
Q. All right. I want to look next at what's been admitted as Exhibit 70. Can you see that document?
A. Yes, I do.
Q. This also appears to be a document generated in 2016?
A. Yes.
Q. And it includes -- it appears to be an email from somebody named Jennifer Tardiff at the Washington State Patrol Crime Lab?
A. Yes.
Q. And it appears that she's in the firearms section?
A. That's true.
Q. Do you know Ms. Tardiff?
A. I do.
Q. All right. And she is, actually, a Washington State Patrol Crime Lab employee, correct?
A. Yes. She's a NIBIN technician.
Q. All right. And her name is no longer Jennifer Tardiff?
A. That, I don't know.
Q. All right.

In her cover memo, she indicated that one of the fired cartridge cases appears to be a match, correct?

A. Yes.

Q. And she also indicates that if she would like the hit confirmed -- correct, she's referring to this as a hit?

A. Yes.

Q. And she also asks -- she also tells the recipients that if they have any questions pertaining to the firearms or forensics of this case, who they should contact; is that right?

A. That's correct.

Q. All right.

And then if we look at the next page of this same document, 70-002, it's called a "NIBIN hit notification," correct?

A. Yes.

Q. And this is a document that's different from the document we just looked at, even though they were both generated in 2016?

A. I think there was semantics differences in -- well, yes, this is a different document.

Q. All right. At the top, it also includes "date of report"?

A. Yes.

Q. Implying that it's a report?

A. That's true.

Q. And at the bottom, although it says this is not a report, it's a notification, it does not include that language that "this is not sufficient for the establishment of probable

cause"; is that correct?
A. It does not mention probable cause.
Q. All right. And although it calls itself a hit notification at the top, it also asks whether hit confirmation is needed at the bottom?
A. Correct.
Q. Let's look next at what's been admitted as Exhibit 51. This appears to be -- I want you to ignore the top, because it's just a more recent forwarding of this document, and look at this email, which appears to have been sent in 2018; is that correct?
A. Yes.
Q. And it includes similar language, that if a microscopic confirmation is needed to please contact the crime lab?
A. Yes. "For warrants or arrests, please, contact the crime lab."
Q. In particular, it says "if" it's needed?
A. Yes, if a detective desires --
Q. I'm asking what it says.
A. Oh, okay. Yes, it --
Q. "If a microscopic confirmation is required, please contact the crime lab."
A. Well, it says more than that. It says, "If a microscopic confirmation is required for warrants, arrests, et cetera, please contact the WSP Crime Lab."
Q. Right. And it also says, "Note: Not all leads require

confirmation," correct?

A. That's correct.

Q. And it further advises that confirmation requests will be addressed as routine casework?

A. Yes.

Q. There is not an explanation in here as to whether or how or why something might be -- a confirmation might be required?

A. No, there is no -- no guidance telling the user, who submitted this information into the computer and had the computer sort it, there's no -- there's no guidance there to say whether or not you need, in your investigation, a confirmation. That's left up to the user agency, whoever collected this information and is doing the investigation. This is work that's being done in the NIBIN environment. It's not a field investigation.

Q. Exactly. Thank you.

On page 3, we again have a lead notification; is that correct?

A. Yes.

Q. And that appears to have been sent and generated by the Washington State Patrol?

A. That's on the header, yes.

Q. And it specifically references the laboratory's firearms unit?

A. It does.

Q. And, again, it starts with "date of report," correct?
A. Correct, yes.
Q. And then moving down one page to page 4 of Exhibit 51, it indicates that the images were reviewed by a operator/scientist?
A. Yes, operator, slash, scientist, yes.
Q. And it, in fact, lists two operator/scientists, both Mr. Gonzalez and Mr. Jones; is that correct?
A. That's correct.
Q. Implying -- consistent with the policy of the State Patrol Crime Lab not to push out a report unless it's been peer reviewed; is that right?
A. No, I disagree.
Q. It certainly indicates that two people have done this examination; is that right?
A. Yes. In this case, it's two operators.
Q. But it indicates that they're operator/scientists?
A. It's an either/or. My interpretation is that is an either/or choice; an operator, slash, scientist. Certainly a scientist can do this work. In this case, it was operators that did the work.
Q. All right. And, again, it does not include any language suggesting that a confirmation is required for the establishment of probable cause; is that right?
A. The words "probable cause" do not exist in this warning.
Q. All right.

So I want to take a slightly closer look at your report. Do you have a copy of that in front of you?

A. I do.

Q. And that's Exhibit 170. If you can turn to page 5 of your report. I'm sorry. We don't have it loaded, so I need you to look at the hard copy, unless counsel wants to bring up a copy for your review.

A. I have a copy of page 5.

Q. Thank you.

And it includes your conclusions; is that right?

A. Yes.

Q. And one of your conclusions is that a lead notification is not an official Washington State Patrol Crime Lab forensic scientist report, correct?

A. Yes.

Q. And that's even though some of these documents indicate, at the top, that they are generated by the Washington State Patrol Crime Lab?

A. Yes.

Q. And that's even though, at the top, it indicates that it's a report?

A. Correct.

Q. And that's so even though it indicates at the bottom that it is generated by an operator, slash, scientist?

A. Yes.

Q. All right.

You also conclude that identifications made or identifications -- I guess "identification" is the wrong word.

The lead notification is not, in fact, a match without a required laboratory scientist examination?

A. Yes.

Q. And that is so, even though a cover memo from the Washington State Patrol Crime Lab describes something as appearing to be a match?

A. Correct, that is included in their description.

Q. All right.

And even though in the same document it's referencing whether they have questions about forensics?

A. Yes.

Q. And, finally, it's your conclusion, Mr. Noedel that all of this is confusing?

A. Yes, I believe the NIBIN lead notifications, as they're presented in this case, are confusing.

Q. And, in fact, border on misleading; is that correct?

A. I think they could mislead someone, yes.

Q. And these are documents that are sent out by the Washington State Patrol Crime Lab to the detectives and other investigators?

A. I'm not sure if these are sent by the crime laboratory. The crime laboratory is an accredited body. That's how we know

these are not crime lab reports. These appear, to me, to be sent out by the ATF NIBIN clearinghouse.

Q. All right. Well, I've got up in front of you Exhibit 70 again, what's been admitted as Exhibit 70.

A. Yes.

Q. Does that appear to be an email from Jennifer Tardiff to some investigators?

A. Yes, it does.

Q. And you just confirmed for us that Ms. Tardiff, whom you know, is an employee at the Washington State Patrol?

A. Correct, at this time was a NIBIN technician, not a forensic scientist.

Q. But she was employed by the Washington State Patrol Crime Lab at that time?

A. Yes, that's true.

Q. All right. So it's being sent out by the Washington State Patrol Crime Laboratory?

A. Yes, this memo was sent by the crime laboratory.

Q. And your ultimate conclusion in this case is that these documents that are being sent by the crime lab to detectives and investigators are confusing, if not downright misleading?

A. I believe they are confusing and can be misleading.

Q. Thank you.

MS. BECKER: No further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. HAMOUDI:

Q. Mr. Noedel, do you know Kathleen Decker?

A. I do.

Q. You worked with the Washington State Patrol Crime Lab and you worked with her on a variety of cases, correct?

A. Yes, I did.

Q. Can you tell us what you think about her competence as a detective?

MS. BECKER: I would object as to being beyond the scope of my cross-examination, and it was not included in the disclosure with respect to this expert.

MR. HAMOUDI: The government just reviewed a series of emails written by officials to Ms. Decker to bolster her confusion as to what is a hit or a match, and I think that this opens up the inquiry as to that, Your Honor. She had her take testimony as to her particular emails.

THE COURT: I'll allow limited latitude, counsel.

A. So I found Ms. Decker to be a competent and a good -- someone I would consider a good detective. I enjoyed working with her.

Q. (By Mr. Hamoudi) And I want to talk to you a little bit about the document that ATF -- the ATF document, which you reviewed.

A. Yes.

Q. Can you open it up?
A. Yes.
Q. Okay. There's a definition of a NIBIN hit, and then a definition of a NIBIN lead.
A. Yes.
Q. Correct?
So define a NIBIN lead.
A. So -- so the lead, using these semantics, is the unconfirmed potential association between two or more pieces of ballistic evidence, based on the correlation review of the digital images in the database, and that can be done by an examiner or a technician.
Q. And this document also clearly defines a NIBIN hit, correct?
A. Yes.
Q. And how does it define a NIBIN hit?
A. The hit is the result of two or more pieces of evidence being confirmed as a match by a firearms examiner. And NIBIN hits are based on the review of images, followed by or/and microscopic confirmation by a firearms examiner, and then the document defines firearms examiner.
Q. And when you testified a little bit about correlation review, the first step of the correlation review has to do with the list of the 30 candidates; is that correct?
A. Thirty or more, yes. The correlation is submitted -- in

other words, the data is captured -- and the operator says go, and the computer churns through its information and it returns a list.

Q. Okay. And the technician chooses one, but doesn't choose others, correct?

A. The technician chooses which ones to look at or not look at, and chooses any to suggest be followed up for confirmation.

It's the technician's choice as to whether or not any of the images are good associations or if none of them are good associations. It's up to the technician to review the photographs.

The computer does not necessarily return good matching or correlated information in the first, second, third, fourth, maybe up to the 30th, suggestion that the computer makes. That's why a human has to sort through the photographs, because the computer can return false positives.

Q. And then after that selection judgment is made by the first technician, those selected comparisons are then sent forward to the next technician, correct?

A. Correct. The first technician isolates the ones that that technician likes, as agreement, and then that is sent on, and a second technician evaluates, if they agree that there is agreement that's worth confirming.

Q. Okay.

And would you agree that that process, which involves two

law enforcement officers, could have an environment of confirmation bias?

A. Yes.

Q. And what is confirmation bias?

A. Confirmation bias is skewing the results of an examination in order to confirm or support one another or a preconceived idea about a particular outcome of a test.

Q. And the Washington State Patrol Crime Lab is an independent agency, correct?

A. Yes.

Q. And it is independent from law enforcement, correct?

A. That's not correct. It's a civilian branch of the Washington State Patrol.

Q. That's what I meant. I'm sorry.

A. Yeah. So it is connected to a police department, but the majority of employees, if not all of the employees in the crime lab, are civilian employees.

Q. You looked at Exhibit 79 and 80, those two images and these two-dimensional images.

Can you describe to the court what is the difference between actually looking at a casing and looking at a photograph like that, what are the limitations and why manual examination is so important.

A. So the reason for confirmation by a human firearms examiner is required is because these two-dimensional photographs only

show this one perspective.

In reality, what the firearm examiner is considering is not only the brand of ammunition -- I don't know if these two brands match each other. Different brands can produce different types of patterns of toolmarks.

The most valuable thing that the examiner can do now is manipulate these specimens in three dimensions; that is, changing the rotation and orientation of the stage, along with changing the orientation and position of lighting, and looking at areas beyond the simple center of this cartridge case; looking at areas on the sides and on the rim that may be useful for including or excluding the cartridge cases from each other.

That comes with a firearms examiner's training and experience, and so the computer doesn't necessarily know what to look for. The computer follows the program. Then the confirmation is important because that's when an actual human being, with knowledge of the limitations of any particular comparison, can use the microscope and use the equipment to either refute or identify, confirm, what the computer has suggested.

Q. And one of the dangers you avoid in having that process take place is maybe having police officers act on a lead when, in fact, the lead is not a match, correct?

A. Yes. To completely answer that, I would say, historically, every computer's suggestion, lead, had to be confirmed by a

firearm examiner. But there are only about a thousand of us firearms examiners in the United States, and so the number of leads the computer, with all its various technicians, was generating far outpaced the capacity of any crime laboratory. And so results were getting delayed and delayed and delayed, and so the NIBIN administrators at the ATF said, "We need a fast way to get information out."

The reason that some of the language says, "This may not need to be confirmed," is that if a case is over or dead, there's no reason to have a confirmation done by an examiner. So the detectives decide whether or not this is a case that's going to go forward, so we better get the confirmation.

So the whole purpose of the confirmation -- or the whole purpose of the lead notifications was to rapidly give information to detectives so that they could expedite a confirmation, if their case is active and the information is beneficial to their investigation.

Q. And you talk about expediting a confirmation. The Washington State Patrol Crime Lab cooperates with law enforcement agencies if they need casings matched immediately following a lead, correct?

A. Yeah, certainly that's a negotiation. There is -- on the request form, there is, actually, a box to check if you would like a rush examination. Usually that is triaged by the section supervisor, and he evaluates how much priority to give any given

case. But, absolutely, cases can be expedited if they are of investigative importance.

Q. Say, for example, I'm a homicide detective and I come to you with a homicide case, and I want to act quickly on a lead. Would that be the type of case that would be expedited at the lab?

A. Yes. The key being a homicide case. For example, if one were to expedite two no-suspect drive-bys, where there is just cartridge cases laying in the street, it probably wouldn't be expedited. But when you're talking about homicide, those are the highest profile cases for the State Patrol, whether it be in firearms or DNA, or any of the other disciplines.

So, certainly, homicide is the type of case that can be expedited and done on a rush basis.

Q. I want to direct your attention to the NIBIN lead in this case, Government's Exhibit 51.

The email written by Mr. Gonzalez to the detective in this case, he writes, "Please see the attached lead notification," correct?

A. Yes.

Q. So there's not using the language "hit" there, correct?

A. Correct.

Q. And it says, "The fired .40 cal cartridge cases," and then describes the case, "appear to correspond." The words "appear to correspond," what would that signal to you?

A. That that is an admission of uncertainty and that is -- I think that is the author of this memo's signal that they've not been confirmed, nor can he confirm them, and he can only report that they appeared to correspond.

Q. Okay. If we can bring up Government's Exhibit 17, and we can go to -- I think it's 134. Let's move to the next page, please.

This is previously admitted Defense Exhibit 134. Go to the next page, please. Go to the next page.

The highlighted portion, Mr. Noedel, what is -- the language, "Forensic examination has established that shell casings recovered from the scene matched the gun known to be owned by Gizachew Wondie," what is that language signaling to you?

MS. BECKER: Objection, Your Honor. This is, again, beyond the scope of my cross-examination.

THE COURT: It's overruled. You may answer the question.

A. To me, when an analysis is described as forensic examination, I expect that that was an examination conducted by a forensic scientist.

Q. (By Mr. Hamoudi) Down at the bottom, the language here, "The test results linked conclusively to the shell casings collected from the Amarah Riley murder scene on 9/19/2018 and Gizachew Wondie's Smith & Wesson .40 caliber firearm."

A. That statement is deceptive in that "linked conclusively" would, again, imply that a firearms examiner has conducted and issued a report that says identified, identified to be -- that's the only way to link, conclusively, two cartridge cases to each other. The computer cannot do that.

Q. And last question: Do you recall testimony you gave about if, hypothetically, a casing is destroyed, that you cannot obtain a confirmation because the casing no longer exists, correct?

A. Correct. If one or any of the exhibits that are claimed to be associated by the computer are destroyed, then it's, essentially, game over. You have to have the example test-fires or the example gun to regenerate test-fires to even conduct the confirmation comparison. If that evidence is destroyed or not available, you cannot even conduct the required confirmation step.

Q. And the destruction of that casing also means that you cannot exonerate that casing, correct?

A. Correct, you cannot include it or eliminate it. You can't -- it's a no-examination. No analysis can be conducted because you don't have the elements to compare.

MR. HAMOUDI: No further questions, Your Honor.

THE COURT: Recross?

MS. BECKER: Just a moment, please, Your Honor.

No, Your Honor. Thank you.

THE COURT: Thank you, sir. You may step down.

THE WITNESS: Thank you.

Next witness?

MR. HAMOUDI: No more witnesses, Your Honor. The defense rests.

THE COURT: Counsel for the government?

MS. BECKER: Your Honor, the government doesn't have any witnesses. Thank you.

THE COURT: No other witnesses? You're resting as well?

MS. BECKER: Correct.

THE COURT: Counsel, are you prepared to make closing remarks on the motions?

MS. BECKER: The government is, Your Honor. If you could provide some direction as to which party you'd like to hear from first and on which of the two motions pending before the court.

THE COURT: Well, this is a defense motion. I'll tell you what, counsel. Why don't we take a recess now. That will give you the opportunity to organize whatever materials that you have to assist in your presentation, and we'll resume in, say, ten minutes.

MS. BECKER: Can I ask one question first?

THE COURT: Sure.

MS. BECKER: Are we going to argue the motion to

suppress the arrest independently, and then, second, take up the *Franks* motion, or do you want all argument --

THE COURT: Let's keep them separate, counsel, so it's easier for the court to take in the context. If you need to overarch or cross-reference, that's acceptable to the court as well, but I prefer you to keep your remarks confined to the motion.

MS. BECKER: Thank you.

THE COURT: Anything else by way of clarification?

MR. HAMOUDI: Nothing else. Thank you very much, Your Honor.

When should we be back to court?

THE COURT: Oh, let me ask you this? How much time do you anticipate to argue both motions?

MR. HAMOUDI: Let me ask my colleague.

I think that Ms. Brin is going to take the probable cause aspect. She will be advocating for 20 minutes, and I myself, approximately 20 minutes.

THE COURT: Counsel for the government?

MS. BECKER: Similar.

THE COURT: Okay. Well, I'm not putting you on a time limit, counsel. We have dedicated these two days. I don't want you to treat that as a goal. You don't have to maximize the two full days with your argument. I just want you to know you're not in a rush. Let's start back up at 10:15.

We'll be in recess.

(Court in recess 10:00 a.m. to 10:23 a.m.)

THE COURT: Counsel, if you're ready, let's get started.

MS. BRIN: Thank you, Your Honor. I think I've won the lottery of going first.

I do have two housekeeping matters that I do want to address with the court as well.

The first is that we submitted a declaration from King County Superior Court Judge McDonald, and we would ask that the court enter that into evidence as an exhibit, and I do believe that that -- we have discussed this with the government, and I do believe that they will be objecting to that exhibit.

THE COURT: Okay. Have you presented that in hard copy?

MS. BRIN: I apologize, Your Honor. I do not have a copy of it. The declaration was filed on, I believe, Friday.

THE COURT: It's a bit of a challenge, counsel, if I haven't read it.

MS. BRIN: Sorry, Your Honor. It's Defense Exhibit 157. And, Your Honor, Ms. Stordeur has been able to bring it up on the screen as well.

THE COURT: Let me read it. Just one second, counsel.

MS. BRIN: Thank you, Your Honor.

THE COURT: Okay. I've reviewed it.

MS. BRIN: Thank you, Your Honor.

And we would ask that it be entered as an exhibit at this time.

THE COURT: Counsel for the government?

MS. BECKER: Your Honor, the government does object to the admission of the declaration in its entirety.

The government had an opportunity to sit down with Judge McDonald to discuss potential testimony. Mr. Hamoudi indicated back in early 2020 that he expected that Judge McDonald would be called to testify at this hearing, and I sat down with him to review what that testimony might be.

In light of that, the government cannot agree that paragraphs 6 and 7 are a complete reflection of what Judge McDonald would testify to; rather, if subjected to cross-examination, the government believes that Judge McDonald would provide additional context that would be relevant for this court's consideration.

Because they are not putting Judge McDonald on the stand and subjecting him to cross-examination, the government is unable to bring forward those facts.

Moreover, this declaration was presented to us on Wednesday, with Judge McDonald leaving town and becoming unavailable on Friday. The government was, therefore, unable to secure supplemental declaration to discuss those facts.

For those reasons, the government does object.

Nonetheless, with respect to paragraphs 1 through 5 and paragraph 8, the government does not object. Our objection is limited to paragraphs 6 and 7.

THE COURT: Counsel?

MS. BRIN: Your Honor, the government put Judge McDonald at issue in their response in, I think, January of 2020. We have repeatedly told the government that they had put Judge McDonald at issue, and they did so at the hearing here.

If Judge McDonald was a witness the government wanted to call, my understanding is that Ms. Becker was in touch with him throughout the last two years.

We spoke with Judge McDonald. He reviewed and edited this declaration and returned it to us. It is sworn under the penalty of perjury, and we provided it to the government.

The government has access to email. If they wanted to call Judge McDonald and subpoena him, they could have done that.

We understood that Judge McDonald was going out of the state and did this in an effort to not bother him, or require a sitting King County Superior Court judge to come and testify at this hearing, as a courtesy.

We provided the declaration to the government on Wednesday. Judge McDonald was always on notice and the government was always on notice, since they put him at issue, that he was potentially a witness in this case.

If Judge McDonald or the government had intended to elicit

other testimony, Judge McDonald either could have refused to sign the declaration, he could have edited it to make sure that those paragraphs were full and complete, or, in between Wednesday and Friday, the government could have provided additional information that it asked to be included in the declaration or informed us that Judge McDonald did not agree with what he had sworn under the penalty of perjury and wanted to add things to it.

Throughout this case, you know, we have gone back and forth with the government on declarations, on stipulations. I will be asking the court to consider a stipulation we entered this morning. We have attempted to give the government every opportunity to object or oppose or change anything in an attempt to streamline these proceedings.

We would note that this is an evidentiary hearing, Your Honor, it is not a trial. If the government has an objection and says that this is not complete, I think the court can consider that as to the weight, but I believe that -- for the purposes of this hearing, with the evidentiary rules as they are -- for the purposes of this hearing, that this is an appropriate and reliable declaration, and it should be admitted.

THE COURT: Thank you.

Counsel for the government?

MS. BECKER: Your Honor, Ms. Brin is correct, this is an evidentiary hearing, and any party who wants to put forward

evidence has the opportunity to issue a subpoena and put the witness before court.

Counsel is the proponent of the entirety of this declaration, and they could have issued that subpoena. If Judge McDonald was unavailable, we could have talked about rescheduling. The scheduling was set here over June 7th and 8th, as well as June 21st and 22nd, to accommodate schedules.

Again, this document was provided to us on Wednesday. I reached out to Judge McDonald's chambers, and he was not available to meet or to talk during that period, despite my requests, before he departed.

And counsel is not correct that I've been in continuous conversation or communication with Judge McDonald throughout the pendency of these proceedings. That is not correct. Our first meeting with him was several weeks ago.

THE COURT: And do you know when Judge McDonald will be available once again?

MS. BECKER: I do not know. I did not know he was departing.

THE COURT: Do you know?

MS. BRIN: I do not know, Your Honor.

THE COURT: Well, the concern the court has, this hearing has been set for a period of time -- an extended period of time, and the court had a separation specifically between the first hearing and then today's date, and it's a little bit late

in the game for an offering of this type.

The court is going to sustain the objection by the government as it pertains to paragraphs 6 and 7. I will allow the admission regarding the other paragraphs.

The court notes that either party was free to call any witness. This court, as you know, did not put any limitations or restrictions on the government or the defense on the number of witnesses that could testify. Ample time was given to both parties at the last hearing, and today as well. It's now 10:30. We still have the balance of the day to be able to take witness testimony. If there is a need to take Judge McDonald out of order, or even by way of special accommodation, that could have been a request made to the court, and that was not done.

This is helpful information in terms of paragraphs 6 and 7, but under the circumstances and the manner in which it was presented to the court, the court will sustain the objection by the government, and those paragraphs will not be admitted.

Now, I'll let you know that the court is not going to rule today. I'm going to set this matter over for ruling to July 1 at 1:30, and if you believe, between now or before then, that you can get in contact with Judge McDonald -- I'm not going to require Judge McDonald to come to this courthouse and testify; one, I don't think he's any different from any other witness. I've shown up for jury duty down in King County, as a federal judge, and I don't think it's that much of an inconvenience for

him to come here.

If the parties are willing to agree and stipulate that he can make his appearance by way of a telephone call, that is acceptable to the court. I know there is the right to confront witnesses and accusers, but if Mr. Wondie's lawyers would agree to allow Judge McDonald to testify by way of a telephone conference, and he's back in town, this court will certainly keep the opportunity for additional testimony, as it relates to those paragraphs, to the parties.

I'll leave that there. This court made its ruling as we speak right now, but you'll have the opportunity to clarify that information, either side.

I'm not asking Judge McDonald to come off of vacation. I don't expect that you would even know how to get in touch with Judge McDonald. If he has staff like I have, they will not bother him on vacation.

So with that, that's the court's ruling.

Next issue, counsel?

MS. BRIN: Thank you, Your Honor.

At this time we would also withdraw our subpoena, formally, to Detective John Free. I don't believe that the court has ruled on the motion to quash, and so we wanted to let the court know that we will also notify his sergeant, I believe, that we would withdrew that subpoena.

And then, finally, Your Honor, we did file the stipulation

about the casing -- the disposed casing. We filed that this morning, so we would also ask the court to consider that.

THE COURT: Any objection?

MS. BECKER: No, Your Honor.

THE COURT: All right. The court will consider that document as well.

MS. BRIN: Thank you, Your Honor.

THE COURT: Does that take care of your preliminary issues, counsel?

MS. BRIN: It does. Thank you, Your Honor.

THE COURT: Please proceed.

DEFENDANT'S CLOSING ARGUMENT

MS. BRIN: Thank you, Your Honor.

I'm going to address the government's argument as it relates to the warrantless arrest and alternative probable cause.

This argument is meritless on its face. The government has asked the court to apply the collective knowledge doctrine to a *Franks* case but has not cited to a single case in which the court has done this.

The government treats the collective knowledge doctrine as a choose-your-own-adventure for law enforcement, but that is contrary to the policy behind it and to the precedent supporting its application.

Collective knowledge is almost always applied when an

officer with probable cause directs another officer without probable cause to arrest an individual, and this is in the arrest context. That's what I will refer to as the directed-arrest application of this doctrine, and *United States v. Ramirez*, at 36 F.Supp.3d 970, is an example of that kind of case.

That is not what the government says happened here, and it is not what happened here.

The SWAT team was not directed to arrest Mr. Wondie based on the drug investigation. It did not arrest Mr. Wondie based on the drug investigation or at the direction of anybody with knowledge or who was even involved in that investigation.

Instead, Your Honor, the government attempts to wedge the facts of this case into the very narrow secondary application of the collective knowledge doctrine. In extremely rare and very unique and specific circumstances, probable cause has been found when it was known to some officers involved in an investigation but not to other officers either executing a search warrant or conducting an arrest. That application depends on two things: Communication and reliance, and neither of those things exist under the facts as presented here.

Your Honor, there is a district court case called *United States v. Holmes*, and that's 36 F.Supp.3d 970. It was a district court in Montana that looked at a number of issues relating to the search and seizure of a firearm in an unrelated

search warrant.

And the judge in that case noted that, in all cases in which the collective knowledge doctrine is used, to save an arrest or seizure not based on the underlying warrant, the arrest or the seizure must be, quote, based on, end quote, the information that establishes probable cause, and that, quote, the causal chain that leads directly to -- in this case, the arrest of Mr. Wondie -- must begin with that piece of information, end quote.

Here, Your Honor, the causal chain that led directly to Mr. Wondie's arrest was the homicide investigation. It had nothing to do with the drug investigation, and the government has stipulated to that.

The drug investigation had no drugs, no drug sales, and no facts that would support probable cause until after Mr. Wondie's arrest. The agents were hoping that they would get facts that supported their drug investigation through the Decker warrant. The correspondence that is in the record clearly shows that that was the intent of the federal agents. What they didn't expect was for Officer Alvarez to jump the gun and illegally arrest Mr. Wondie before any other facts had been established.

The agents were counting on the search warrant of Mr. Wondie's car and home to provide the probable cause for the drug investigation, and that is not a situation in which the collective knowledge doctrine applies.

The SWAT team illegally arrested Mr. Wondie. They were there on that day at that time to do one thing, which was to execute the Decker warrant, and, as Detective Decker acknowledged and as the government has conceded, there was no probable cause to arrest Mr. Wondie based on that.

There is no authority or precedent that the government has cited that it contemplates applying that very narrow secondary application of the collective knowledge doctrine to the facts in this case.

But, Your Honor, there was also no probable cause to arrest Mr. Wondie for any drug crime. The cases that were cited by the government in its briefing on this issue highlight the fact that, on December 6th of 2018, they were not there yet.

In *U.S. v. Wesby,* probable cause was found when a citizen complaint was independently witnessed by law enforcement and other witnesses.

In *Struckman*, the Ninth Circuit specifically noted that law enforcement officers may not simply rely on the claim of citizen witnesses but actually must independently investigate that knowledge or interview other witnesses.

Your Honor, I could go through each case that the government has cited, but I won't.

There are monitored phone calls between informants and defendants. There are weeks and weeks of law enforcement surveillance, confirming tips or intel provided from sources of

information. And in every single case cited by the government where a court found probable cause, independent corroboration by law enforcement of the criminal activity itself existed, or an informant or complainant accurately predicted future behavior, did not just talk about what had happened in the past, or there was physical evidence, controlled buys, or surveillance by law enforcement of detailed and uniquely criminal activity. In most of the cases cited by the government, there are multiple of those things.

Here, the government has not even shown one. Instead, what it did was pile multiple deadends on top of each other, and then tried to pass it off as a road map to probable cause. Even if the court credits all the testimony given by Agents Dkane and Spencer, they still did not come close to meeting their burden. But, Your Honor, there is good reason not to credit the testimony of Agent Dkane.

On the first day, Agent Dkane testified from memory because, as he told us, he did not take any notes on this investigation, and he produced two reports that were extremely bare-bones, and yet he started his testimony off by talking about an undisclosed interview with the SOI and an executive from Pfizer, a pharmaceutical company, and he claimed, at this meeting, he did not take any notes, and he didn't have any reports.

If we can go to page 139, line 2.

On direct examination, when Ms. Becker was asking him questions, he said, "When he mentioned the pill press, that's when I asked Mr. Donnelley" -- and that's the Pfizer executive -- "if he could, sort of, talk shop with him; that is, asked him as many technical questions as he could think of to stump him, so to speak. So in that part of the interview, I was doing more listening than talking while he and Mr. Donnelley threw out bunches of phrases about rotaries and different kinds of punches and a whole variety of, sort of, technical jargon related to pill presses."

That was pretty impressive testimony.

However, after short voir dire in which defense counsel confronted him about not having any documentation about this meeting, he decided he wanted to clarify that testimony.

At page 142, line 17, suddenly Agent Dkane wanted to clarify and said, "The reason I asked Mr. Donnelley into the room was to ask two or three very limited questions, specifically to use jargon I was not familiar with. It was mostly to actually give me the ability to determine if, when this particular guy said, 'I know about pill presses,' did he actually know about pill presses?"

So, initially, he was willing to enlarge that conversation and talk about the fact that they had spent as much time as needed; on voir dire, was asked whether he had notes, and then he wanted to clarify. And this continued throughout his

testimony.

He consistently testified about things that were contradicted by documents in evidence. He spoke very confidently and at length about the information he knew about Mr. Wondie dealing drugs.

Specifically, he claimed multiple SPD officers and the SOI told him or gave him information that Mr. Wondie was dealing drugs in the Mud Bay parking lot. And, Your Honor, that is why reports and notes are so important, because if Agent Dkane had kept some, maybe he would have remembered all of that information a little more clearly.

On the second day of his testimony, he was confronted with the receipts, the actual, documented correspondence he had received about Mr. Wondie.

So let's start with the SOI, Your Honor.

At page 144 at line 10 -- and this is the first day -- Agent Dkane talked about the SOI and -- I apologize. This is a long section -- but on this day he talked about the fact that "G operated in the area around the 1500 block of Broadway," and that's at line 21.

"He indicated" -- and this is the SOI -- "that, sort of, his territory, for lack of a better term, was the area around the 1500 block of Broadway in the Capitol Hill area." And Ms. Becker asked, "What's there? What's at the 1500 block of Broadway?" And Agent Dkane answered, "There's a smoke shop and

there's a Mud Bay."

He also said that this area was well known to some of the East Precinct SPD officers he was working with, and we are going to come back to each one of those officers.

Agent Dkane was correct about one thing: The SOI did specify where he believed G hung out, but it was not the 1500 block of Broadway.

If we can turn to Exhibit 21 on page 83.

Here is what the SOI actually said about G; said, "He hangs out a lot on 12th and Jefferson. The whole corner is owned by Ethiopian business owners, and they all turn a blind eye to their own people."

The SOI never said or provided information about G, who they believed to be Mr. Wondie, selling drugs in the Mud Bay parking lot.

The SOI also gave an explanation earlier, and again here, about why G would spend time in that area. To Agent Spencer in her notes, what he had said is that G had grown up around Yesler Terrace. One of the SPD officers also acknowledged that. And here, again, the SOI was saying that this was an area that was primarily owned by Ethiopian business owners, the people in his community.

If we can turn to page 182 at line 22.

Here, Ms. Becker asked Agent Dkane some clarifying questions, and she said, "Earlier, we talked about the interview

of the SOI. Did you take some of the information you learned from the interview of the SOI and talk with Officer Blackburn about it?"

And what Agent Dkane said, "Specifically, the information I mentioned a bit earlier about the Mud Bay parking lot in the 1500 block of Broadway." He immediately recognized that the information the SOI was describing to him about the activities there was already known to him, because they had already observed it, and it was already a problem for officers in that area.

So did Officer Blackburn say that? Well, the government did not call Officer Blackburn, despite it was their burden to show probable cause, but, luckily, we have an email from him.

If we could turn to Exhibit 109, page 4.

And here is the email from Officer Matthew Blackburn to a number of other law enforcement officers, and I would ask that the court note the date on that, November 29th. That is long after the SOI was interviewed, that is long after the SOI was in communication with all of the agents at the direction of supervising Agent Dkane, and it was just before Mr. Wondie's arrest. And what Officer Blackburn is asking is, "We are trying to find out where Wondie deals dope." That is not a question that an officer, who immediately recognizes and knows an individual is dealing dope in a certain place, would be asking other officers.

Agent Dkane also talked about information that he learned from other SPD officers. On page 184 and to 185, this is when Ms. Becker asked Agent Dkane specifically about Officer Averett, and what he said is that, "Officer Averett indicated that he believed he was selling drugs" -- and this is, again, about Mr. Wondie -- "out of that Mud Bay parking lot, and then he provided information about Mr. Wondie related to him always carrying a gun to a hot dog stand that he had in the area. He described some problematic encounters he had with him."

And Ms. Becker said, "When you say 'problematic encounters' are you talking about one or more than one that he described to you?"

And Agent Dkane said, "It sounded to me like he was talking about a habitual-type situation."

Again, Your Honor, the government did not bring Officer Averett to testify about his own observations, but, luckily, we have an email. So we know what Officer Averett actually told -- and this is an email that was sent to Detective John Free on November 20th and was forwarded to Agent Dkane.

What Officer Averett actually said was that, "Mr. Wondie has a business license to sell hot dogs at 1518 Broadway," which, Your Honor, is, basically, the Mud Bay parking lot. He also had a name for that business.

And what Officer Averett said is that, "That area is a narcotics hotspot for us." He goes on to talk about the

dismissed case that the court is aware of and is in evidence, he talks about an anonymous tip, which is not in evidence, and he talks about his interactions with Mr. Wondie: "He has admitted to me that he is carrying his gun during several nightlife patrols over the summer. I can send you the incidents. Conversely, if you want information, I would love to hear about it." That was the email from Officer Averett.

Officer Averett did not, as the court knows, ever say that he had problematic encounters with Mr. Wondie. In fact, repeatedly, in evidence that is in the record and in multiple exhibits, he has always said that Mr. Wondie was cooperative, and he used that word repeatedly.

Again, in this same email, Officer Averett is specifically saying that they do not have evidence or facts that link Mr. Wondie to drug dealing; what they have is a suspicion.

And if we can turn to 185, line 11. Again, Agent Dkane, testifying from memory, talked about two other officers, Officers Souriall and Chesney, and what he said is that he "received forwarded emails where they were describing very much the same activity we've been talking about, meaning they were familiar with Gizachew Wondie, they were familiar with the area that he sold drugs at that is in and around that 1500 block of the Broadway area. It was, basically, more of the same."

Q. And the issue here, of course, Your Honor, is what Agent Dkane says is an assumption, the area he sold drugs in. What

the evidence shows is that there were no facts establishing that link.

If we can pull up Government's Exhibit 14.

Here is that email from Officer Chesney, and, again, Your Honor, Officer Chesney, from the SPD, told John Free, and it was then forwarded to Agent Dkane, that he runs a hot dog stand in the 1500 block of Broadway on Capitol Hill. He specifies that's the Capitol Hill Tobacco parking lot, which is also shared with the Mud Bay there, on Friday and Saturday nights. He confirms it is called Chronic Dogs. He talks about the car he bought, and he says, "We believed he was/is slinging dope on Capitol Hill, not in the parking lot, but have never pinned it on him." He also noted that he has a valid CPL and keeps his handgun in his car at all times.

And you will recall, Your Honor, that Agent Dkane testified that he had received information that Mr. Wondie was supposedly bringing his gun to his hot dog stand, and there is no evidence in the record of that, either.

This officer also confirmed what the SOI said, which is he frequents this area down by where Yesler Terrace used to be, because that was an area that he was familiar with and, as the SOI had said earlier, that is where he grew up.

And I would just note that these are areas that he frequents or has been seen in. Officer Chesney is not saying that these are areas or specific places where he sells drugs.

And here, Your Honor, is that email from Officer Souriall, and Officer Souriall literally says nothing about drug dealing. He says, "Don't know any gang associations, but he hangs out near Cal Anderson Park," which is, again, the area that's down by where Yesler Terrace was, in the specific area, "has been arrested with a gun recently by SPD and is frequently in the Mud Bay parking lot. He's with a group of people, and I can get more information. If I can, I will." That was it.

Your Honor, at worst, Agent Dkane was lying on the stand to bolster probable cause, and, at best, he was misremembering the information that he had in his possession two years ago because he had not documented that. Luckily for us, that evidence was documented in multiple emails sent by the very SPD officers that he was testifying about.

Your Honor, what Agent Dkane did on the stand was a master class in watering down probable cause. He had three pieces of information about Mr. Wondie. He knew that Mr. Wondie was associated with two different places, the 1500 block of Broadway and the area where Yesler Terrace used to be. He also knew that Mr. Wondie had a legitimate reason to be in the Mud Bay parking lot, and he knew that Mr. Wondie had community and family and had grown up in the second area in which he was identified as spending time.

The final piece of information he had was that SPD considered both of these places, places where there was drug

activity.

What Agent Dkane did on the stand is, he connected that first piece of information -- "This is where Mr. Wondie hangs out" -- to that third piece of information -- "This is where SPD believes there is drug activity" -- and in doing so, he ignored the legitimate reasons Mr. Wondie had to be at both of those places. And what he did was, he turned assumptions and speculation about Mr. Wondie's activity in those places and testified as if they were fact. They were not fact.

And, Your Honor, this is exactly why individuals who live in communities that police identify as high-drug-trafficking areas are consistently and wrongfully arrested without probable cause.

Luckily, Your Honor, in this case, SPD had not done what Agent Dkane tried to do here. In each and every one of their emails, they acknowledge that they did not have facts, they did not have enough of a link to prove their speculation or to establish probable cause.

The government bears the burden of showing there was probable cause for an arrest, and this was not it. If the government believed that the SPD had gotten enough facts to get them to probable cause, they certainly would have called those officers here to testify firsthand, because, as the evidence shows, those were the officers who were familiar with Mr. Wondie; the ones who said he was cooperative, who

acknowledged and confirmed that he had a legitimate reason to be in both of those areas, and who, yes, said they had suspicions and hunches but nothing more than that.

Your Honor, I would ask the court not to give any weight to Agent Dkane's testimony about the SPD investigations. Whether he was being intentionally untruthful, or if he was just unable to accurately remember the facts from back in 2018, none of what he testified to is supported by the record.

The other thing that Agent Dkane discussed at length were his secret personas, Lala and Mike Davis. The actual conversations on these texts speak for themselves, and they are both in evidence. Neither amounted to anything. But even when the exhibit was right in front of him, Agent Dkane was still willing to exaggerate what was on the paper.

On page 154, starting at line 12, Agent Dkane said, "As the conversation developed" -- as if that was natural -- "he brought up drugs in a variety of ways, and then on two occasions he sent me pictures of those drugs, and asked me on a number of occasions to get together and indicated I would be able to get those drugs or find out more about them when we meet."

If we can pull up Exhibit 26, page 9.

The first mention of drugs in these text messages came from Lala, or Agent Dkane, when he said, "I skipped class today to get high." Mr. Wondie's response is, "Dam (sic), no drugs for me." And she says, "Are you a good boy?" And he says,

"Depends," with a smiling emoji.

Mr. Wondie did not discuss drugs or drug use until Agent Dkane continued to push this issue and insinuate that the female, Lala, was not interested in good boys, or said that Mr. Wondie was, quote, no fun, end quote, because he said he didn't use drugs.

Agent Dkane also testified that Mr. Wondie was going to meet up with Lala to sell -- and he implied -- to sell or to give her drugs, and that is laughable. Starting on page 5 of this exhibit, Mr. Wondie is certainly trying to meet up with Lala, but it does not have anything to do with drugs.

The conversation started with a sexual tone, and that continued throughout. Quite frankly, Your Honor, Mr. Wondie wanted to meet up with Lala because he wanted to have sex with her, and that is apparent through this entire conversation, and it is also clear that Mr. Wondie's motivation does not change. His motivation was always about meeting up with a cute girl who suddenly started talking about how she was into getting high and was into, quote, having fun, meaning using drugs.

The photos that he had sent could have been smashed-up aspirin that Mr. Wondie wanted to look like cocaine, because Lala, the girl he was trying to hook up with, had said that that's what she was into. Mr. Wondie never said he had drugs to sell or even that that was something he wanted to do. The Lala texts did nothing to move the drug investigation forward, and

Agent Dkane knew that.

His other persona was Mike Davis. In the entire conversation between Mike Davis and the phone number that Agent Dkane believed was Mr. Wondie, was Agent Dkane randomly reaching out to this person and asking for a drug hookup and burning the SOI without telling any of his partners that he was doing so.

During that conversation, again, that person, who he believed to be Mr. Wondie, never said he had drugs to sell. He never said he could or would sell the Mike Davis persona or any of Mike Davis's friends drugs. And when Agent Dkane realized it wasn't going anywhere, as he said on the stand, he had to cover, and so what he did is pretend that he had gotten Mr. Wondie, or the person he believed was Mr. Wondie, confused with a well-known drug dealer, and both of them laughed it off and asked each other for a more recent number for that person.

Supposedly, the link there is that Mr. Wondie then went back to the SOI and was upset that the SOI had given his phone number out to people to try to get drugs.

If we can look at page 103, line 6 through 25.

When Agent Spencer was asked about the SOI getting upset about that, she confirmed what I think we all know, which is, if one of your friends or colleagues or just somebody that you know gives your phone number out to some stranger and says to hit you up for drugs, whether or not you are selling drugs, Your Honor, that would be upsetting, and you would confront the person who

had given your phone number out.

Nothing about that phone conversation or Mr. Wondie's alleged response to that phone conversation moves the ball forward on probable cause.

Turning now, Your Honor, to Agent Spencer's testimony. Her testimony really confirmed what the court has already seen in the pleadings.

She spoke mostly about the SOI. She confirmed that what she knew is that the SOI was a, quote, B.S. artist willing to do what it took to get out of the 20 years he was facing. He was not credible and he was not reliable.

Agent Spencer's testimony, when asked by Ms. Becker, that she had no reason to doubt him was inconsistent with the facts even as Agent Spencer knew them at the time of his arrest. The first thing the SOI did was lie to them, and he continued to lie to them throughout the entire time he was in touch with the agents.

Agent Spencer's testimony confirmed that the SOI had provided no corroborated intel on G. First -- if we can turn to page 95, lines 7 through 10.

First, one of the things that the SOI had told the agent about G was that he was buying raw materials from China to make counterfeit pills, and that was included in Agent Spencer's own notes.

At this part of the transcript, the court can see that she

confirmed they had no confirmation connecting him to any kind of unusual packages at his address. And that is not because they didn't try, Your Honor. As the court will recall, they sent an email to the Postal Service specifically asking for confirmation of suspicious packages at that address and did not receive it.

The SOI also said that G was, quote, active on the dark web. We talked with Agent Spencer a little bit about the fact that there are specialized agents who are familiar with the dark web and who investigate the dark web and cryptocurrency, and she confirmed that she did ask those agents whether they knew of G, or Mr. Wondie, and they confirmed that they did not.

Next, there was the storage unit and the pill press. The SOI told the agents that he was working on a pill press with G and that they had stopped working on it only eight or nine months before, when a part was seized by Customs.

What we learned is it was actually more than a year and a half before his arrest that this had stopped, and we also learned that he never told his Louisiana handlers that he was building this new press, even though he was testifying in federal court that same month.

Agent Spencer said that she was shown a picture -- and we saw the picture -- of a pill press by the SOI, and she also confirmed that there was nothing in that photo that connected that pill press to Mr. Wondie.

Further down in that same section, Agent Spencer admitted

that she was not able to corroborate any of the information about Mr. Wondie, the pill press, the pill press part, or the storage unit.

To be clear, Your Honor, to this day the government does not have evidence that the SOI was not building that pill press all by himself and trying to set Mr. Wondie up for it.

Agent Spencer also confirmed that the SOI never made any connection between the agents and G that resulted in any evidence that would have been helpful for them to establish probable cause for drug dealing.

From about pages 80 to 83 of the transcript, Your Honor, she discussed this on cross-examination. At page 82, lines 3 through 12, she admits that despite them asking, the SOI never introduced G to anybody, not through text message, not in person, nothing else. And then, as we know, he was picked up and brought back to answer to his parole violation.

Finally, Your Honor, at page 105, from lines 114, Agent Spencer discusses the fact that she was also surveilling Mr. Wondie for the drug investigation. She confirms that she never saw Mr. Wondie in possession of drugs during that surveillance, she never saw him exchange anything that looked like drugs, and she never saw patterns that were consistent with drug dealing while she was surveilling him.

On direct examination, they discussed the person that they saw getting in and out of Mr. Wondie's car. She also confirmed

that that was the same individual twice, that that person was not in the car for just a minute, and that individual was also dropped off at another location, which is not consistent with drug dealing.

Your Honor, later in this testimony, Agent Spencer specifically said that she was surveilling him to get -- and this is at lines 4 through 7 -- she was specifically surveilling him to get additional facts to establish probable cause for her own investigation. They did not get any additional facts from this, either.

Finally, Your Honor, the citizen complaint. The original complaint and Agent Spencer's follow-up report are both in evidence, Your Honor.

And if we could turn to Exhibit 7.

I would also note for the record, Your Honor, SPD had this complaint, and, in fact, SPD was the organization that provided this to the federal agents, and they certainly didn't think that this was enough of a fact to get them to probable cause.

And the original complaint, on its face, should have given both Agent Dkane and Agent Spencer some pause. The complainant is clearly frustrated that SPD had not responded to what she believes are issues in her neighborhood. Neither Agent Dkane nor Agent Spencer did any follow-up outside of interviewing this individual on the telephone, and there are inconsistencies and omissions between the first complaint and what she said to Agent

Spencer in the telephone conversation.

This is not an anonymous complaint, Your Honor, but it does not have the same indicia of reliability that the Supreme Court has discussed in *Illinois v. Gates*. The agents did no inquiry into this person's motive. There is no explicit description of the activity. There is no detailed description of the alleged drug dealer. There is no track record of this complainant providing accurate information, or future predictions that are, sort of, born through. And, Your Honor, the activity that is described in this complaint ended months and months before Mr. Wondie's arrest.

Agent Dkane acknowledged, on the stand, that the reliability and motive of citizen complainants has recently been cast into question, both in the media and by law enforcement, as it should be. Put plainly, Your Honor, citizens with no criminal history are willing to weaponize the police against certain communities and certain people. This has always happened, but it now has been cataloged and studied and documented. Law enforcement can no longer consider a citizen complainants like this as presumed reliable, and the Ninth Circuit has alluded to that fact in cases like *U.S. v. Struckman*.

The citizen complaint and the follow-up interview of this individual did not move the ball forward on probable cause to arrest Mr. Wondie for any drug investigation.

Your Honor, there was no probable cause to arrest

Mr. Wondie on December 6 either from Detective Decker's warrant or from any other drug investigation.

Even if there was, this case does not fall into the collective knowledge doctrine. His arrest was not directed by an officer for the purpose of arresting him for a drug crime, and his arrest was not based on or made in reliance upon any information that establishes probable cause.

The government has conceded that there was no probable cause based on the Decker warrant, and so Mr. Wondie's arrest was unlawful under any factual situation that we put it in. What that means is that the illegal arrest is cause to suppress anything that flowed from it, and that includes all of Mr. Wondie's statements and any secondary warrants that flowed from those statements or information that was provided in those statements.

We would ask that the court find that Mr. Wondie's arrest was illegal, an illegal, warrantless arrest, and suppress any evidence that flowed from it.

THE COURT: Thank you, counsel.

Counsel for the government?

GOVERNMENT'S CLOSING ARGUMENT

MS. BECKER: Thank you, Your Honor, and good morning.

Well before December 6th of 2018, and certainly no later than December 6th of 2018, before the contact with Mr. Wondie, agents from HSI, detectives from the Seattle Police Department,

and investigators at the King County Sheriff's Office knew, collectively among them, that there was, in fact, probable cause to arrest Mr. Wondie on that date.

The question was not whether they acted motivated by the information that they had with respect to the drug investigation, but it is a simple question of whether there was, in fact, probable cause on that date to support the arrest on probable cause.

Your Honor, the standard that this court applies is one of probable cause, and it is a well-known standard. It is articulated probably most frequently in the case law and with respect to searches, but it is the same standard that applies to arrests. And it is, as articulated in so many cases, that, under the totality of the facts and circumstances known, whether a prudent person would have concluded that there was a fair probability that the suspect had committed a crime.

It is an objective standard. It is not up to the individuals making the arrest and involved in the investigation, ultimately, to determine whether there is or is not probable cause.

Counsel has referred to the fellow-officer rule, and the government does rely on it. This is set forth in Ninth Circuit case law in *Ramirez* and *Garcia*, both of which are cited in the government's brief. And it indicates that when officers are working in concert, the knowledge of one is imputed to all of

them.

And although HSI was working on a drug investigation and the King County Sheriff's Office was working on a homicide investigation, they met together, they exchanged information, and they collaborated, including on the morning of the arrest when all of these agencies, including the Seattle Police Department, met and exchanged information in advance of the planned execution of the Decker warrant, and, indeed, HSI agents stood by and went to the scene immediately upon Mr. Wondie's contact and arrest.

If the collective knowledge supports probable cause, then the arrest can be made by anyone, even a person who does not himself have knowledge of all the facts, as long as that person is in communication with or is acting at the direction of the team that does have knowledge.

While the same standard applies, Your Honor, with respect to the meaning of probable cause in both the arrest and the search context, there are some significant differences.

As this court is well aware, with respect to a search without a warrant, such a warrant is presumed to be unconstitutional absent evidence that it fits into one of the closely guarded exceptions to the rule for warrants. This is not true with respect to arrests.

An arrest is constitutional, whether there is a warrant or not, if it is supported by probable cause, and a warrantless

arrest satisfies the constitution so long as the officer had probable cause to believe the suspect had committed a crime. No warrant is required.

Separately, staleness is a well-known concern of search warrants. Because there is probable cause to locate an item in a particular place at a particular time does not mean that, a day or a week or month or a year later, there is still probable cause to search that location for an item of evidence. For that reason, anytime an officer applies for a search warrant, they must provide specific facts that indicate that the warrant is not stale. And search warrants, under the rule, are for a particular and short period of time. They are not indefinite authorizations to search the location. This is just simply not true with respect to arrests, and it is for a very good reason.

Once an individual commits a crime and there is probable cause to believe that individual has committed a crime, that crime has been committed. There is no change that occurs as to whether the crime has been committed. It is looking at a past, completed act.

Certainly, new information can come to light that indicates that the probable cause has become insufficient, but it does not erase the facts that have happened before that supported whether the crime was committed and by a particular individual, and it is for this reason that arrest warrants are not limited in time in a way that search warrants are. In fact, arrest warrants can

remain in a system and active for not just days or weeks, like a search warrant might, but for years on end.

I want to turn to the probable cause here and some guiding principles that were alluded to and sometimes directly addressed by the defense.

The cases are clear, starting with *Gates*, that in evaluating informants, information provided by non-police officers, the evaluation of that information provided is based on the totality of the circumstances. It looks at an informant's credibility to the extent it can be evaluated, the basis of the informant's knowledge, the detail that the informant is able to provide, and any corroboration that the investigators are able to conduct with respect to the information provided.

Case law also gives us additional guidance with respect to citizen informants, as opposed to informants who are already engaged in criminal activity. And it tell us, in *Navarette v. California,* a case out of Supreme Court from only seven years ago, that an anonymous call can establish probable cause if the information is detailed and implies firsthand knowledge, and it is so even if that call is anonymous, because even though the identity of the caller is not known, it is likely knowable and the caller likely knows that it is knowable because of the 9-1-1 system that can be traced back.

And the point of this is that individuals know -- both

informants who are criminal in nature and citizen informants know that if they provide false information, that there may well be a consequence, criminal or otherwise, to themselves.

The Ninth Circuit has also told us, again, in *Villaseñor*, that reliability is further established by an individual's willingness to meet face to face with the police and to admit to more significant criminal activity on their own part than the police knew independently, and criminal conduct that invited more severe penalties.

Here, Your Honor, we have both a citizen informant for whom, when they are able to provide detailed information, a presumption is afforded them that it is credible, and we separately have information from a criminal informant who provided detailed information not only about Mr. Wondie but, first and primarily, about himself.

So let's start with the source of information.

The source of information met with Agents Dkane and Spencer, as well as other individuals, immediately after his arrest. He knew that he was already in trouble, and the first things that he did were to acknowledge his own role in setting up the deal that ultimately led to his arrest, and he admitted to additional misconduct, which was that he intended to rob the person with whom he had set up the deal, who happens to have been Lala, Agent Dkane's well-known and well-used undercover persona.

In addition, the SOI admitted that he was himself participating in the building of a pill press that was intended to be used to manufacture counterfeit pills, and later he provided photographs of that press.

He admitted to the investigators that material in his car would show that he was so involved in criminal activity. On his own, he provided information, including location information and, later, a tracking number. He provided information indicating that the pill press part that he had ordered had been seized by CBP, and he told that to HSI before HSI knew it, or, at least, before these particular agents knew it. He also admitted that he was a drug addict and told them that he was on probation.

Later, after he was released, some of his first communications with HSI was to point out that they had left evidence in his car and sent a photo of it to them.

The HSI agents involved in his arrest on that day performed some further investigation to vet the information that he was providing. They had an industry analyst present to ask questions that the agents did not feel confident to ask themselves, to confirm that the SOI actually had information, reliable, accurate information about a pill press.

They called HSI agents in Louisiana to vet him, and received no derogatory information back, and they contacted HSI agents here who had previously met with the SOI on a previous

occasion.

The one piece of derogatory information was rather colorfully expressed as "B.S. artist" in Agent Winger's note. That notation was explained in considerably more detail by documents submitted by counsel and by Agent Spencer, who indicated that those HSI agents, who work in a entirely different field, felt that the information that was within the SOI's personal knowledge was not helpful and not useful because it was not as detailed or as informative or even provided as much information as the HSI officers themselves already knew.

Later, the HSI officers also confirmed what the SOI had told them with respect to the pill press being shipped to a location at a storage locker in Kent, and confirmed that that is exactly what had happened; that it was the kind of part that they were interested in and that the SOI had talked about and that it had been seized.

It was against this backdrop of information providing extensive information exposing him to substantially greater criminal liability, but the SOI also provided information about others, including Mr. Wondie, and that information was that Mr. Wondie was participating with the SOI in the building of the pill press; specifically, that he was financing it and paying for the SOI's know-how to order and build the pill press.

The SOI provided a nickname that he knew Mr. Wondie by, he provided a description of his car, and a phone number, as well

as information that I'll discuss in a few moments with respect to Mr. Wondie's additional activities.

He did not purport to claim that he knew where exactly the pill press was or even Mr. Wondie's current address. He did not stretch.

And based on the interview initially with the SOI that was conducted on October 2nd, as well as follow-up interactions with the SOI over a period of time, until he was no longer available to him because he was arrested and returned to Louisiana for probation violations, based on that entire set of interactions, Agent Spencer believed, personally, that the SOI was credible.

It is clear, of course, that a SOI is not an upstanding citizen. He has numerous criminal convictions, he was on probation, and he had a significant motive to cooperate. But, as Agent Dkane expressed, that does not make him not credible. In fact, the fact he was known already in drug trafficking, indicating he does have the requisite knowledge, and more often, because he was providing information about his own misconduct, he had a lot at stake. So he was motivated to provide truthful information that would advance an HSI investigation, with knowledge that if he provided false information, he could be in even bigger trouble than he already was.

And it is for these reasons that the case law is clear that when an informant, who is already under arrest or is providing significant criminal information about their own activities, is

meeting with the police and providing detailed information about themselves and others, that this court can and should find that information to be credible.

That is not, however, the only piece of information in the possession of HSI, SPD, and the King County Sheriff's Office. HSI and SPD both knew that a citizen complainant, an individual who is presumed by the law to be credible if they provide detailed and specific information from firsthand knowledge, is credible.

That complainant initially made a report to the Seattle Police Department, I believe, in August, although that's reflected more accurately in the document, and then was interviewed by HSI Agents Spencer and Dkane later. Although that person has not been identified here, it's clear that that was a known person. They were able to call her at the phone number that was included in the documentation that they had, and they were able to run that individual's criminal history and determine that she had none.

In that interview, which is documented, I believe, at Exhibit 9, the complainant described what she personally saw from her apartment. She described personal knowledge. She indicated that she had made repeated complaints, which was consistent with her earlier report. She described, in detail, a car coming into the alley behind her residence and having numerous hand-to-hand contacts with other individuals, as well

as people posting up along the alley to further engage in similar activity. And although she described it as drug dealing, in addition to her initial description, Agent Spencer and Agent Dkane, from their knowledge, also recognized that conduct is consistent with drug dealing.

She did not know the individual's name or residence, so she could not have been involved in the swatting or doxing that defense counsel has referred to, the inviting the police to harass a known individual for hidden motives.

Agent Spencer then went out to the area to look at the alley that day that the complainant described, and found that it met the description that she provided.

The agents found no reason for this individual to fabricate, particularly because the conduct that she had been complaining about and had said that it lasted for a number of months, beginning in 2018 and continuing until she left town in approximately August of 2018, had ended and she was no longer asking for any police intervention but was still standing on the statements that she had previously made.

And, finally, the location that she described, and that Agent Spencer went out to and looked at, is consistent with information provided by the SOI. The same text messages that counsel, helpfully, brought up for this court earlier in which the SOI provided, after his release, when he was being asked information about Mr. Wondie so that they could plan to buy for

him, said that he was dealing from his car, exactly as described by the complainant, and in the area of 12th and Jefferson, which is just a block and a half from where this complainant was complaining.

In addition to the information provided by the SOI and the complainant, Agents Dkane and Spencer had additional information. They went to a meeting -- or, rather, Agent Dkane went to a meeting. Not only did he review the emails that counsel has reviewed with this court, but he met, in person, with, at least, Officer Elliott Averett about the investigation he was conducting, and particularly noted that Officer Averett was concerned about Mr. Wondie openly selling drugs and being armed at the same time, and that Officer Averett was, in fact, pursuing an ERPO, an extreme risk protection order, because of his concern about the combination of those events.

MS. BRIN: Objection, Your Honor; misstates the evidence in the email.

THE COURT: It's overruled.

MS. BECKER: The information from Officers Averett, Souriall, and Chesney also indicated that the defendant was, in fact, repeatedly in an area that was identified as a hotspot by the Seattle Police Department for drug trafficking. Although he had a lawful reason to be at his business, it was always set up in the Mud Bay parking lot, which is a particular hotspot, and it is also reinforced by information from the SOI, where he

said, according to Agent Dkane, information that he provided in the interview was that he was selling drugs from the Mud Bay parking lot.

Finally, we have the undercover texts between Agent Dkane and Mr. Wondie in two separate personas. The court has all of these text messages before it and can review them. I won't cover them in great detail. I will just point out a few important details.

First, with respect to the undercover communications between Agent Dkane and the defendant, in his persona as Lala, the same persona that successfully lured the SOI to a location to provide Xanax for $200, during those communications Agent Dkane was able to confirm that the name on the Facebook account matched the data provided during a background check -- or a records check, rather, that was associated with the phone number initially provided with the SOI, and, in fact, the defendant himself provided that phone number in the text messages.

The defendant said during those exchanges that he went to school and was studying computer science, something that was independently confirmed by Detective Decker and is in evidence at Exhibit 68, which is a snapshot of the defendant's course schedule.

During the course of their conversations, Lala -- Agent Dkane as Lala -- initially raised the question of her interest in drugs, and then nine days later, the defendant, on his own,

raised the question of drugs again, and that's on page 17 of Exhibit 26, when he began the conversation with, "What are you doing?" She said, "Slangin and bangin." And he responded, "Sounds gangsta. Tryna blow." And Agent Dkane told you, based on his experience, and, frankly, based on popular culture, it's fairly clear that references to "blow," as well as his other references to "snow" and "fire," are references to drugs, and, in particular, with "snow" and "blow," to cocaine.

He told Lala that he had decent shit and invited her to slide through, implying that she should come over because he had it available at that time.

Additionally, he twice sent photos of apparent cocaine to Lala. These are documented at Exhibits 26, 27, and 28, and, in particular, I would draw the court's attention to pages 18 and 19 of Exhibit 26, when the defendant texted to Lala that he had a little that she could try, told her to call when she was ready to stop playing, provided his phone number, and provided a photograph of apparent cocaine.

Of course, counsel is correct that Mr. Wondie could have been lying, but the standard is not proof beyond a reasonable doubt that he possessed cocaine or was willing to give it to Lala. It is not even clear and convincing evidence or a preponderance of the evidence. It's the low standard of probable cause. And through his communications with Lala, Mr. Wondie independently gave Agent Dkane probable cause that he

possessed and was willing to distribute cocaine.

With respect to the communications between Agent Dkane and the defendant in the agent's persona as Mike Davis, these, obviously, on their face, as well as through the testimony of Agent Dkane, reinforced the belief, based on all the information gathered to date, that the defendant was, in fact, engaged in drug dealing.

When contacted by an individual unknown to him seeking drugs, the defendant did not do what you would expect any of the things you would expect an innocent person not involved in drug dealing would do, which is to shut that person down and say, "I don't know what you're talking about. I'm not interested."

Rather, he began a cautious questioning of who the contactor, Mike Davis, was and how he knew him, because he was, obviously, concerned that he was being contacted, as drug dealers ought to, frankly, be cautious about who they're being contacted by when that person is a stranger to them, because of the risk of informants and undercover contacts, exactly as this was. He did not shut the conversation down, but rather went on to repeatedly feel out Agent DKane, in his persona as Mike Davis, as to who he was and what he wanted.

In fact, the defendant asked Mike Davis directly what it was that he wanted. "He" referencing Mike Davis's purported friend that was interested in buying drugs. And when he said that he had percs or bars, he did not respond with, you know,

"you have the wrong number" or in any other way that you might imagine but indicated that if he knew these people better, he might be willing to help and indicated he was willing to refer them to someone else.

When Mike Davis asked about Gutu, that was exactly who -- the defendant knew who that person was and indicated that that's who he would have referred Mike Davis to. And as Agent Dkane told us, Gutu is not a made-up name but an individual that Agent Dkane has personally interviewed himself.

Finally, we have not only the direct interactions between Agent Dkane in the persona of Mike Davis and the defendant themselves but the follow-up that came from that when the SOI independently reached out, on his own, to Agent Spencer to ask whether someone in the persona of Mike Davis was contacting the defendant, because the defendant had come to him and told him about it.

The SOI indicated that the defendant was scared and spooked that someone was on to him, and he was able to provide a detailed description, and accurate description of the conversation, indicating that, in fact, the SOI and the defendant were in contact and were talking about drug-related things.

All of the portions of these investigations together, which is the test that this court must apply, the totality of the circumstances point in a single direction, and that is that the

defendant was engaged in dealing drugs, and that he had, in fact, delivered drugs and had possessed drugs and was willing to provide them.

Defense counsel both, in their briefing, suggest that this is an inevitable discovery argument, Your Honor, and the government has repeatedly disclaimed that, and I want to speak briefly to it.

The question before the court is not would a different investigation have led to this same information, nor is it would the police have arrested -- would HSI and the Seattle Police Department have arrested the defendant on December 6th, 2018, but for the Decker warrant. That is not the question before the court.

And it is not a question for a couple of reasons. One, Agent Dkane told you, I think quite frankly and quite accurately, that even though they might have had probable cause to arrest, it was not strategically sound --

MS. BRIN: Objection, Your Honor, as to this line of argument. This is testimony we objected to during the eliciting of it, and I believe the court sustained our objection.

THE COURT: The court will note that, but please continue.

MS. BECKER: Thank you, Your Honor.

Although that objection was sustained at that time, he testified further on that topic, permitted by the court in

redirect.

He indicated that it was not strategically sound that, although there might have been probable cause to arrest him, that is not proof beyond a reasonable doubt, and more importantly, from Agent Dkane's perspective, that was not sufficient evidence that our office would have accepted the case for prosecution at that time because they did not, in fact, recover drugs from the defendant.

Again, the question is not whether they would have arrested the defendant on that date. The question before this court is was there probable cause to do so.

The cases on this are clear and replete. I cited some in my brief, and I'll review them briefly, Your Honor.

In *Lopez*, which I'm not confident I included in my brief, which is at 482 F.3d 1067, the court was looking at whether there was probable cause to arrest an individual on the stated grounds that the officer had, in fact, arrested, and they concluded that there was not. But they went on to say that, "Our conclusion that the police did not have probable cause to regard Lopez," the defendant, "as the attempted shooter in their particular investigation, does not end the inquiry, because they can affirm, they can uphold the arrest on any basis evident in the record."

Devenpeck v. Alford also supports this. The cases make clear that an arresting officer's state of mind, except, of

course, the facts supporting the state of mind, the facts known to the investigating team, is irrelevant to the existence of probable cause.

A subjective reason for making an arrest need not be the criminal offense as to which the known facts provide probable cause.

So the fact that the defendant was arrested by Officer Alvarez on facts that are not before this court, whether it was appropriate or not, for the facts stated, does not end the inquiry. As these cases make clear, the inquiry is was there probable cause known to the investigating team that would support that arrest?

The doctrine of inevitable discovery comes into play only when an arrest is illegal, and, here, the arrest was legal because, although not supported by the probable cause but developed by a homicide investigation, it was supported by the investigation into the defendant's drug trafficking.

I would also direct the court to *Whren v. United States,* which is a pretext case, which emphasizes this same principle. The question of whether the police would have made the stop is not the question before the court, and it is, in fact, irrelevant.

I want to address one comment made during the arguments made by Ms. Brin about HSI did not have probable cause because they were waiting, and, in fact, they were waiting on the

execution of the Decker search warrant to provide that probable cause, that is not the evidence that is before this court.

Agent Dkane indicated that he was continually having to put off the defendant in his communications as Lala because the homicide investigation slowed down their investigation, and it, as being involved in a homicide, took priority over their investigation. It was not because he needed probable cause to arise from the execution of that warrant.

A couple of concluding remarks, Your Honor.

Again, as this court well knows, the standard that is to be applied is not what would stand up to a reasonable doubt standard. It would not. The question is, under the totality of the circumstances, was there probable cause to arrest the defendant for the offense of which the investigating team collectively had knowledge for? The answer is yes.

The government generally agrees with the defense; if this court finds that the arrest was unlawful, it must suppress the defendant's statements, and it must suppress the search of the defendant's -- the second search -- the search of the defendant's second apartment, the later search warrants that were obtained. Whether other evidence should also be suppressed relies more on whether the Decker warrant is upheld or not.

However, if this court finds that the arrest is lawful; in other words, if it was supported by probable cause developed during the drug investigation, and known, even if only in

pieces, to the investigating team, this court's inquiry should come to an end.

If the search was lawful, everything else that the government would use at trial flows, appropriately, from such an arrest. If the arrest was lawful, search of the defendant's person incident to that arrest was also lawful. If the arrest of the defendant was lawful, any search of the vehicle thereafter within a reasonable time was also lawful, even without a warrant at the side of the road where Mr. Wondie was stopped and ultimately arrested.

It also supports the warrant for the vehicle that was later obtained by Detective Branham of the Seattle Police Department. It does not rest on anything that was obtained by Detective Decker's warrant. It rests, instead, on the observations that were made during the arrest and in the search immediately post-arrest of the defendant's person and of the car, which, although done under the auspices of the warrant, was lawful anyway as a search of a vehicle incident to arrest for which there was probable cause within the vehicle.

The interview of the defendant, again, would not, therefore, be suppressed, and nor would the warrant for the defendant's apartment.

And, accordingly, if so, if the arrest was lawful, this court need not reach the question that my co-counsel and Mr. Hamoudi are about to address with respect to the Decker

warrant. It is, frankly, irrelevant if the arrest was lawful.

Thank you.

THE COURT: Thank you, counsel. Rebuttal? We're going to break at noon.

DEFENDANT'S REBUTTAL ARGUMENT

MS. BRIN: Thank you, Your Honor. Briefly.

Ms. Becker talked about the fact that an arrest warrant need not be limited in time.

What I have noted that the government has not done in its briefing, nor did it do today, is explained to the court what crime there was probable cause for, what drug was it that the officers had probable cause to arrest Mr. Wondie for allegedly dealing, and what transaction was it that they were going to base that arrest on?

Your Honor, Ms. Becker went through the probable cause cases, and she talked about informants, totality of circumstances, their basis of knowledge, and the detail that they have provided. But Ms. Becker has also cited to cases that cite to Supreme Court precedent, such as *Ibarra*, that talks about the fact that those things are all helpful.

And the totality of the circumstances requires independent corroboration of more than just a description, of more than just an identification of an individual and, in fact, Your Honor, discuss the fact that simply being near or close to a crime, such as the SOI described with great specificity, would not be

sufficient for probable cause.

Ms. Becker talked about the SOI and the fact that everything he said was detailed and he showed that he had a significant amount of knowledge about the building of pill presses and that they were able to corroborate all of the information that he told them about himself, about what he had done and his own criminal activity.

What Ms. Becker fails to acknowledge is that they were unable to corroborate a single link between the SOI's criminal activity as it related to the building of a second pill press and Mr. Wondie, or G. That is not sufficient under any precedent.

Your Honor, Ms. Becker also talks about *Navarette*, and this brings me to something we raised in our briefing, which is that most of the cases cited by the government about the credibility of complainants and about the credibility of SOIs are addressed in the reasonable-suspicion context, and the government has waived that argument here.

The government is no longer claiming that the SWAT team could have done a stop of Mr. Wondie based upon reasonable suspicion that he was or had been dealing drugs. They are now required to meet the probable-cause standard.

The cases, such as *Navarette*, which discuss a 9-1-1 phone call made by an anonymous complainant about somebody who almost drove her off of the road, are reasonable-suspicion cases, they

are not probable cause.

As to the SOI, Ms. Becker also discussed the fact that he was extremely forthcoming with information. But what was established on cross-examination is he wasn't actually that forthcoming. He told them some of what was in his car, but not everything. He told them he was a drug user, but he did not tell them he was a drug dealer and that they would find 26 grams of heroin in his car, along with methamphetamine and scales and baggies. They did find that eventually, after he had supposedly confessed.

And then, as Ms. Becker noted, he wrote them the text message about how they had left the heroin in his car and he was going to immediately throw it away. But what he did, clearly, is he used the heroin, and that was the basis of one of his probation violations.

As to Agent Dkane's testimony, again, about the conversation and saying that the SOI identified the Mud Bay parking lot in his initial interview, although Agent Dkane did not take notes, Agent Spencer did, and there is no Mud Bay mentioned in those notes. Agent Spencer did not testify to that identification, and there is no evidence in the record that the SOI identified Mud Bay, except for Agent Dkane's own testimony by memory, which has been repeatedly shown to be poor.

Finally, Your Honor, Ms. Becker drew the court's attention to page 17 of Exhibit 26, and she said that that is an area in

which Mr. Wondie or the individual believed to be Mr. Wondie raised drugs on his own, and that was the discussion of the phrase, "tryna blow." And Ms. Becker admitted that, actually, what happened was, Mr. Wondie began that conversation with "WYD," which is "what you doin'?" And Lala's response was, "Slangin and bangin." That, in and of itself, is also a reference to drugs inasmuch as "Tryna blow" is. So, again, Lala, or Agent Dkane, was injecting the same types of conversations about drugs, using those same kinds of slang about drugs.

This photo that Mr. Wondie sent when he said, "come through" or "slide through," that was the photo that had something that looked like cocaine on the naked backside of a female. This was all still in the context of trying to develop a sexual relationship; it was not in the context of trying to deal drugs.

Finally, Your Honor, Ms. Becker talks about the fact that Agent Dkane testified about how he needed to put off meeting with Mr. Wondie so that the homicide investigation could move forward.

If Agent DKane had met with Mr. Wondie, and Mr. Wondie had showed up with drugs or to deal drugs to Agent Dkane and then the Decker warrant had been executed, we might be in a different situation, but that is not what happened here.

Agent Dkane, HSI, SPD, King County, all of them together,

all of the different leads that they had that had led to no facts to help them establish probable cause, all of that together does not make any of those leads a fact that could do it. There is no corroboration between those different things, despite Agent Dkane and Agent Spencer trying to make them. And on December 6th, when Mr. Wondie was actually arrested, there was no probable cause for the drug investigation.

Unless the court has any further questions, we would submit.

THE COURT: I have no additional questions, counsel.

It's 11 minutes before noon. We'll recess at this time. We'll resume back at 1:30, and we'll take up the second argument. We'll be in recess.

(Court in recess 11:51 a.m. to 1:34 p.m.)

THE COURT: Good afternoon, again.

Counsel for the defense?

DEFENDANT'S REBUTTAL ARGUMENT

MR. HAMOUDI: Thank you, Your Honor, and thank you, Mr. Wondie.

Here we are now, two and a half years has passed since this case's inception. Here we are, following one of the most difficult summers in our history, a summer that involved battling the pandemic. It involved the cries of community demanding justice and equal treatment under the law. And that community was sparked after a video captured a police officer's

behavior on video. And as Justice Brandeis wrote many years ago, sunlight is the best disinfectant.

But there was no video in this case. There was the court. Had it not been for this court's intervention, granting Mr. Wondie's emergency discovery relief, it is unclear whether we would have learned about a lot of the police behavior in this case.

Detective Decker is a seasoned detective and has received numerous commendations. To be clear, this is not personal. This is about her actions as a detective, occupying a position of public trust.

She violated the standards. She applied to prepare an application for a search warrant to search my client's home and his vehicle. The standards are avoid conclusions; rely on facts. Every fact should be attributed to a source. If the source is a person, explain how the person learned the facts. Any evidence tending to negate probable cause must be included.

The defense bears the burden to establish Detective Decker's intent or reckless regard for the truth by a preponderance of the evidence. This standard is well known.

In *Kansas v. Glover,* 140 Supreme Court cite 1183 at 1187, the court there places in context where that standard sits in light of other Fourth Amendment standards.

Quote, Although the word 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is

considerably less than proof of wrongdoing by a preponderance of the evidence and obviously less than is necessary for probable cause.

Our standard sits in the middle of reasonable suspicion and probable cause.

Detective Decker intentionally or recklessly made representations about firearm forensics in this case. The detective testified that she believed "hits" and "matches" mean the same thing. We do not believe that this is credible in light of the evidence that this court has seen, and we will explain why. But before we do, even crediting that testimony entitles Mr. Wondie to relief.

Under that scenario, Mr. Wondie is entitled to relief under *United States v. Jacobs,* which is cited, approvingly, in *United States v. Perkins*. In *Jacobs*, the affiant acted, at least, recklessly when he correctly stated that the drug dog showed a forensic interest in the defendant's package, but omitted the fact that the drug dog failed to make an official alert.

On September the 21st, two days after the homicide, casings were submitted to a NIBIN computer, and no NIBIN hits returned. This earlier no-hit tended to negate probable cause as to the NIBIN claims she made, something that was never included in the affidavit.

What's worse, under *Jacobs*, for the government, is that at least Jacobs correctly stated that the dog showed an interest in

a defendant's package. Here, as we will explain next, the detective went a step further, incorrectly declaring that the casings were a match and that the casings were linked conclusively to Mr. Wondie's firearm, leaving the judge to conclude that it was his firearm, to the exclusion of all other firearms.

In the lead email in this case and the attached lead documents, nowhere is the term "hit," "linked conclusively," or "matched" used. She admitted, directly on the stand, that her statement in the affidavit was not true.

Irrespective of the fact that the detective sought confirmations for trial, the detective knew that NIBIN is a screening tool. The detective knew what a confirmation process required, and the detective knew that this lead written by Analyst Gonzalez on this date had written on it, "If you want to use it for an arrest or warrant, contact the Washington State Patrol Crime Lab."

The detective, who acknowledged that she had a rudimentary, informal understanding of the NIBIN process, had a duty to provide, in good faith, all relevant NIBIN information to the magistrate, and that is in *United States v. Perkins*, 850 F.3d 1109 at 1116.

This was important because of her professed rudimentary knowledge, because the magistrate, in order to discharge their duty, has to make an independent evaluation of the matter. She

deprived the magistrate the ability to do that.

It is worth observing that she had filled out a request form for the TAC-30 SWAT mobile arrest team, which triggered the use of its team to arrest my client. I asked her directly, Your Honor, "You knew that when you had a SWAT team arrest my client, there was no probable cause to arrest him, correct?" And she admitted, "That is correct."

The detective's own email from 2017 shows she understands what NIBIN's capabilities are. This is at Defense Exhibit 136-28.

She explicitly wrote in that email request that she was interested in linking the shell casings from the scene to the pistol, and then the pistol to any other unsolved shootings. That's the language she uses with NIBIN personnel. The terminology she uses with her colleagues is irrelevant.

She also knew that to use in court proceedings, she had to get the lead verified. Writing an email in 2017 -- this is at Exhibit 136-10 -- and the subject matter of this email, "Request for firearm testing validation." Nowhere in that document does she express any confusion.

Even -- even -- if her personal practice was not to seek confirmation for warrants or arrests, she certainly had no right to usurp the judge's independent duty to make that determination; to let the judge know what Analyst Gonzalez had written in the lead; that these casings appear to correspond.

If a microscopic confirmation is required for warrants, arrests, please contact the WSP Crime Lab, and let the judge decide whether she wanted to have the lead confirmed before signing off on the warrant.

This is not a case where the detective stated in her affidavit that a confirmation is not being sought, because, in her training and experience, all previous leads have led to confirmations. That would be a conditional warrant. That is a condition that is yet to be confirmed, and let the judge decide, "I will let you proceed with this warrant because when I look at the warrant as a whole, I'm going to allow you to execute this search warrant."

We now know -- and this is today, entered at Docket 308-1 -- in another 11th-hour, 12th-hour revelation, that had she reached out for a confirmation, if that's what Judge Richardson wanted, the lab would have done what she knows the lab would have done; would have requested the actual casing, which she would have learned that a confirmation was impossible because the casing had been destroyed in 2017. No warrant would have issued because it would have been impossible for a match to have ever been declared or a conclusive link to have been declared.

This is what makes this use of this unequivocal language with respect to the forensic firearm so problematic in this case.

There has been testimony in this court that police officers, judges, prosecutors act on information provided to them by officers. The match and conclusive-link language was not only falsely presented to Judge Richardson, but it became the central part of the government's advocacy in this case against my client, until Judge Peterson put a stop to it, and it created a specter in front of my client's family and his friends that he provided an instrument that was used in the death of an individual, when that fact was not true, nor could that fact be proven, because the casing had been destroyed.

The detective's testimony that her understanding was that she did not need NIBIN leads verified for the purposes of a warrant was simply not credible with respect to the analyst in this case, Analyst Gonzalez.

In Exhibit 136, in all the correspondences involving Analyst Gonzalez, he repeatedly states, "If a microscopic confirmation is required for warrants/arrests, please inform the WSP Crime Lab." This is the same language used in the lead here. The detective was clearly aware that Gonzalez, as opposed to others, stated, "If a microscopic confirmation is required for warrants or arrests, contact the Washington State Patrol Crime Lab." We now know why that is important, because, as Mr. Noedel testified today, the computer can generate false positives.

The NIBIN program operates in an environment of speed.

None of this was put before the judge so that the judge could make an independent determination to sign off on a homicide warrant to search my client's home, to search my client's vehicle, utilizing a SWAT team in broad daylight in front of a college. False positives result in consequences for the innocent.

And what's particularly problematic in this case is that the casing has been destroyed, meaning the accusation that has been leveled in open court is still out there. The complaint is filed and is a public document. But what we cannot do is now have the casing compared by a firearms examiner to exonerate my client, and this is inimical to our motions of justice and fairness.

But the government defended Detective Decker; on one hand, trumpeting her training and expertise, while, on the other hand, suggesting that she made a mistake. And they cited to Exhibits 70 through 72 in support of that confusion between "hits" and "matches."

These are correspondences in the past that she had as to NIBIN, and they involve Ms. Tardiff, an employee of the Washington State Patrol Crime Lab. In all of her emails, she uses the same "appear" language in quotes. I'm quoting her. Nowhere does she use the word "match" or "conclusively linked." It is important that the particular examiner that she was speaking to, the NIBIN technician, Gonzalez, made a statement to

her consistent with all his other previous statements to her. "If a microscopic confirmation is required for warrants, arrests, please contact the WSP Crime Lab." And this is at 136-2, 136-11, and 136-25.

And the other two exhibits cited by the government involved Jeff Baird, a King County prosecutor, it's Exhibit 73, and Tobin Corlis, Property Management Unit for the King County Sheriff's Office, Exhibit 74. These are not NIBIN technicians or firearms examiners.

She testified on cross-examination, "I have consistently and regularly used the term 'match' synonymous with 'hit,' and my understanding was that that was correct here, as recommended to me by the prosecutor."

But she also said that she is not blaming Judge McDonald. She also said that she is responsible, ultimately, for what is written in her affidavits, and no other affidavit has been produced by the government to corroborate that assertion, that she has used the same type of synonymous language in other NIBIN cases.

And we have some evidence before the court that directly contradicts her understanding of NIBIN. We have her email, at Exhibit 136-28, asking for a NIBIN lead to be conducted. And she's not asking them to provide her with a hit or a match. She's talking about link language, because she understands that this is an investigative tool. She understands the purpose of

this program.

And I would just add, Your Honor, that no testimony has been received by any of her fellow officers that support the use of this language. No one from the ATF testified. Neither Analyst Gonzalez or Detective Jones has testified in these hearings. The court allowed the government, in the *Franks* order, if they wanted to, to call Analyst Gonzalez.

The policy that has been submitted today through Mr. Noedel, by the ATF, makes it very clear the distinctions between NIBIN leads and NIBIN hits.

The policy that has been produced and admitted and testified to by Detective Decker are the standards that she applies to write search warrant applications, standards she violated because she falsely attributed facts to a source, she provided false conclusions, and she withheld information tending to negate probable cause as to NIBIN.

There is some direct evidence in this record as to her motivations.

We know that she was frustrated because two of her warrants were rejected for being overly broad and vague. It is reasonable to infer that, in response to two warrants being rejected because they were vague, she started to write her warrants providing specificity that did not exist, for fear that her warrants would get rejected for the same reasons.

The court can also look to Detectives Decker's intent and

recklessness with respect to how she drafted other aspects of this affidavit.

There is direct evidence of her intent and reckless disregard for the truth with respect to her use of, quote, propensity for violence, closed quote, in describing my client to the judge. That evidence can also be used by the court to consider her other misstatements.

The detective acknowledged she falsely represented that Mr. Wondie had a propensity for violence, when, in fact, Officer Averett reported a potential for violence. She knew the difference between the two, testifying the two differences that potential for violence is possible anytime an individual has a firearm, while "propensity" means that a person has a tendency to be violent. She misled Judge Richardson into the belief that an officer, who had most recently had contact with my client, believed that my client had a tendency to be violent.

Now, the government did not call Officer Averett to the stand to suggest that he told her anything different. And when asked for an explanation, she said, "As we sit here today, I do not." She didn't know why she wrote that.

She admitted that she made a false statement in the affidavit, Your Honor, but it was worse than that. She also withheld her belief that she did not believe that Mr. Wondie would be assaultive towards law enforcement or that she did not believe he would be violent out of past history.

This was significant, because in the application for the search warrant -- if we go to 134-9 -- she incorporated Search Warrant No. 18-S-1161A. And that search warrant refers to Exhibit 133, which is the addendum to the search warrant, and that search warrant addendum was also signed by Judge Richardson, and this is 133-3.

And the narrative that she had provided Judge Richardson previous to this was, "I had been told by confidential sources that Group A has, for an extended period of time, used its accounts on Twitter, YouTube, and Instagram to publish its position in its dispute with Group C and with individual members of that gang, and to rally Group A members to its cause of eliminating its rival."

She's telling a story here, Your Honor, to the judge about a particular firearm, the history of that firearm, against the backdrop of narratives that have been provided to the court about these groups. And within the context of that story, she's telling the judge, falsely, my client has a propensity for violence, and this is a warrant that says murder in the first degree has been committed with premeditation and deliberation.

United States v. Davis 714 F.2d 896, 897 is persuasive on this particular issue. In that case, the police officer just told an outright falsehood, and this is what the court said: "Thompson," the police officer, "could have relied on the facts learned from his subordinates to prepare a truthful affidavit.

This entire problem could have been avoided if Thompson had simply rewritten the affidavit to indicate that he was relying on his officers who had personally interviewed the informants."

Similarly, the affiant in *Franks* could have stated that his fellow officer interviewed the informants in question. By failing properly to identify their sources of information, the affiant in each case made it impossible for the magistrate to evaluate the existence of probable cause.

Franks teaches that, as in this case, that failure is intentional, the warrant must be invalidated. The fact that probable cause did exist and could have been established by a truthful affidavit does not cure the error.

The *Davis* court invalidated the warrant because it was a false statement provided under oath to the judge. That was very problematic to the Ninth Circuit. But it continues.

The detective's pattern of recklessness with respect to identifying men, young men, and, unfortunately, men of color, to be associated with gangs was not just this one instance with Mr. Wondie, but it was others.

She withheld the fact that she interviewed Individual 5 and withheld the fact that he denied being a member of a gang. She didn't even tell the judge that she interviewed him.

She did the same thing with Individual 4, falsely connecting him with Group C when, in fact, law enforcement had affirmatively informed her that he was a member of Group B.

She falsely associated my client with Group A under this theory that they had a conflict with Group B and A, and Ms. Riley ended up getting murdered over it. It's not even clear if that theory holds water. She did this even though Agent Wozniak, who was investigating these gangs, did not know who my client was.

SPD provided her a chart of Group A. It clearly showed my client was not a member of Group A. And the chart identified Individual 1, who she misidentified as Mr. Wondie. At least three Seattle Police Department officers respond to a request about whether my client was associated with gangs. No one responded if he was associated with any of these gangs.

All of this was -- an affirmative statement was withheld when an affirmative statement was made to the judge about my client's association with Group A and putting a firearm similar to the murder weapon in his hand in this photo. This is clear evidence of intent or recklessness, falsely or misleadingly associating my client with particular gangs and other men.

Mr. Wondie had nothing to do with Group A. She had this information in her possession. She had an obligation to tell Judge Richardson, who had signed two separate warrants for Group A, B, and C, that other than the photo she had in her possession connecting Mr. Wondie to these groups and some officers indicating that he had no gang associations, she had an affirmative obligation to tell the judge that.

This is the type of information a judge who has signed these warrants in their collective would want to know. A reasonable judge would say, "Wait. It's just a photo? Officers are telling you that they're not associated with him? Well, what else do you have?" "Well, I have this NIBIN." Maybe the judge would have inquired further about NIBIN. "So all you have is this NIBIN? Let's talk about that."

This is what happens when you skew information, with respect to a judge, and withheld facts.

Now, this is not as if she didn't have resources available to her. We know she was focused on Handle 1, which she was being told was Individual 6, who she purported was involved in Ms. Riley's death. And as he demonstrated, to our investigator's testimony and Ms. Whittler's report, Handle 1 would have readily identified Individual 1, even if she ignored all the resources available to her. But she had these resources. She had a source that was directly providing her with social media intelligence. She had Agent Wozniak assisting her. She had access to a gang database called GETEM. All she needed to do was send a picture of Group A and ask every law enforcement agent who had access to that database, "Who are these people? Do we know their names? I have a hunch. A source is telling me that this group is involved in this person's death, and I want to find out who they are, and I'd like to interview them."

This pattern establishes that she's been reckless with this affidavit on multiple fronts, multiple instances, and the court can be persuaded, taking her behavior, with other aspects of the affidavit, to the extent there is doubt as to other aspects of the affidavit.

She testified that she will use a one-on-one photo show-up when the person making the identification has a familiarity with the person in the photo, and where she has asked that witness to confirm the photo that she has in her possession is that person. This is her standards of using one-on-one photos.

She violated those standards. Applying those standards, she was reckless. She testified that she had no personal interactions with Mr. Wondie before his arrest. Agent Wozniak did not know Mr. Wondie. And there's no evidence in this record that Judge Richardson knew Mr. Wondie. So here you have an individual who has no personal interactions with Mr. Wondie, making an assertion that they believe the individual is, in fact, Mr. Wondie. That's recklessly based on her own standard.

And what's worse is that she included this photo of this individual looking up, with his tongue stuck out, and a booking photo, and he's sitting in the back and his gun is in the air, and it's a small photo.

But there's more. In Exhibit 146 -- go to the second page. Go to the next page. This was a document her sergeant sent to her colleagues and her, and there was testimony by Detective

Decker that she prepared this document. She prepared this document, and this document is attached to this email on December the 5th, which is the day before the warrant was executed -- hours.

Here, in this document that she prepared, she says, "Individual 2 and Wondie each appear to be photographed as part of the Group A." She did not represent to them that Mr. Wondie is the individual in the photograph. Here, a day before the warrant is executed, she's contradicting herself. That's evidence of recklessness and intent.

She was actively looking at social media, either herself or with the assistance of others. She did it with Individual 3. She spoke with witnesses who identified persons for her on social media.

Let's bring up 155-3.

This was the particular photograph she testified and she admitted she was looking at it, and she withheld this photograph from the judge, when an objective assessment, from the defense's perspective, clearly shows that this is not Mr. Wondie.

There's more evidence of her intent and reckless disregard for the truth.

On November 20th, 2018, she had two potential suspects she believed had the firearm. One was my client, and another one, an individual who was involved in shooting at a moving vehicle on May 28, 2018. The individual who was a suspect at shooting

at the moving vehicle had multiple law enforcement contacts with firearms, including one incident involving a .40 caliber Smith & Wesson firearm. This individual, the court learned, was not Mr. Wondie. The detective withheld the fact that the shooting in that case involved shooting at a moving vehicle, similar to Ms. Riley's homicide, had a suspect, and that the suspect was not Mr. Wondie.

Had she included those facts, a reasonable judge would have asked a logical question: How can you assert that Mr. Wondie has the gun if someone other than him was suspected of having the firearm in their possession after the firearm was last placed in Mr. Wondie's position? What this means is that even if the court credits the detective's understanding of NIBIN, which we don't believe should be credible, you still have a serious nexus problem, because you have to establish probable cause to believe that the firearm was in Mr. Wondie's possession on December the 6th, 2018, to search his home and vehicle.

Now, that's not logically possible, because if someone else had the firearm after it was last placed in his possession, then you have to establish what? You have to establish a connection between that person and Mr. Wondie. And there was no evidence in the record or in the affidavit that Mr. Wondie loaned out firearms to people.

Crediting her NIBIN testimony, which we don't think the court should, there still would have been no nexus had this

information been included. That means even if the court says she made a mistake about hits and matches, the warrant still fails because she withheld material information, with respect to nexus, as to who had the gun in their possession on December 6th of 2018.

And we know, on November 20th, 2018, as we went through the timeline chronology of the email when this individual was discussed, and approximately 30 minutes after this, there was that email about Mr. Wondie, and she admitted that she had to get creative with the warrant. She did not list a suspect for the May 2018 incident or describe the fact that he, too, was involved in shooting at a motor vehicle. That was the creativity. Withhold those facts, don't let the judge know, because if I do, what the judge is immediately going to be asking, "Wait, wait, wait, wait, wait. Why are we going to go search his home and vehicle? Why aren't we going to talk to this individual if your logic is he is the one who is in possession of the firearm?"

And we know that they had nexus problems, even though she denied it on the stand. And I asked her -- I ask the court not to credit that testimony and to look at the December 3rd, 2018, email, which I covered with her. And this was the email which is much earlier in time and closer to this event than her testimony here today.

And where she talks about the moment of contact with

Mr. Wondie, and Detective Free writes, you know, "Kathy and I were discussing last week," and December 3rd, last week, puts us in late November. And in this email, it's telling. It shows that they had doubts whether he was presently in possession of the firearm. Using terms like "loaning out the firearm," and as to whether he had control over the firearm the whole time, Detective Free writes, "It might pay dividends down the road."

They had no evidence that he had loaned out his firearm. They wanted to see who he gave his firearm to at some point in the past, and that would lead them to the next step in their investigation: Identifying the shooter. That was the purpose of arresting my client. They admitted they didn't have probable cause to believe he was involved in Ms. Riley's death. Why else would you go to see him?

When she writes in her emails to Agent Wozniak, "I believe I need to chat with him," that's her state of mind. That's her investigative intent, "I want to talk with him. I want to see where this firearm is."

It is hard to imagine that when I asked the detective, "Now we know that they aren't the same person, and knowing that, what would you do differently?" Offer an opportunity to acknowledge wrongdoing, a mistake or whatever, and the answer I got was, "I don't know at that time what else would have occurred to me to be done. I was positive that those were the same people."

Her testimony about these photos, Your Honor, was just not

credible.

And it's hard to go over it in detail, but the transcript sometimes doesn't speak for itself, but the court was present and the court observed the questioning and the photos when we were asking the questions.

And we're taking about a detective with years and years of experience. She testified that she had experience in forensic photo analysis. And just basic hallmark features and dissimilarities, was not even willing acknowledging those, because acknowledging that -- and this is just an inference, Your Honor -- would suggest something terrible for a person on the stand, to make a mistake of such a devastating order.

But we know it's not Mr. Wondie. We know that there was multiple resources available to the detective to easily establish that it wasn't Mr. Wondie. Now, had the judge known, the judge would have immediately become concerned as to why -- what is the connection? What's going on here? What is it with this affidavit, with this narrative? Would have started to question the connection between the firearm, the association, and would have probably started questioning other aspects of the affidavit.

But when the judge is reading the affidavit, the judge reads your affiant has over 17 years' experience in major crimes, investigating homicide, robbery, felony assault, and missing persons cases. Your affiant has been employed as a

fully commission deputy detective with the King County Sheriff's Office for 33 years. Your affiant has attended numerous trainings over the years, to include basic and homicide investigation, blood spatter interpretation, crime scene photography, interview and interrogation techniques, evidence search theory, as well as training in incident command from the 100-level through the 800-level courses. "I am investigating the homicide referenced in this affidavit. In the course of the investigation, I have learned the following." And it is against that backdrop of experience where she says, "I believe the male shown second from the left in the back is Gizachew Wondie."

It is that experience that is being brought to bear that leads the judge to think, "Well, if this detective is telling me that, they've done their homework, they've done their diligence, and I can trust what they're saying to me."

And what we learned through the evidence -- Mr. Stortini's testimony, his report, Ms. Whittler's report, and the evidence that came in -- rudimentary investigation into this photo was not accomplished. None of it was done. That, as well, is evidence of her intent and recklessness.

If individually we have not established intent or recklessness, Your Honor, we submit that we have when taking all of these matters into consideration in their totality; that this affidavit, had the truth been revealed, would never been signed, this warrant would have never been signed, and no search would

have occurred. A SWAT team would not have showed up outside a university on December 6th, 2018, with assault rifles and wearing military gear and taking my client into custody. They just wouldn't have done that.

And we wouldn't be here today. We wouldn't be here today. Mr. Wondie wouldn't have had to grapple with these court proceedings for two and a half years, endured what he's endured. The discovery issues would not have occurred. None of it.

I want to talk about the exclusionary rule a little bit. Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principle mode of discouraging lawless police conduct.

Sounds cliché, but this is from *Terry v. Ohio*, and I was reading it, and it has particular force here. Its major thrust is a deterrent one, and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it, the constitutional guarantee against unreasonable searches and seizures would be a mere form of words.

But the rule also has another vital function: The imperative of judicial integrity. Courts that sit under our constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasion.

I want to go over, briefly, some of the values that would

be served by excluding all of the evidence in this case.

One of the issues is falsely associating individuals with gangs, which is a dangerous thing to do, especially when someone has been killed as a result of a gang dispute, and associating my client with that homicide through false evidence in open proceedings.

Conducting a background investigation into individuals before making claims about their propensities. Making sure not to skew facts when seeking a warrant. Destroying your text messages, text messages that were used and exchanged in pursuit of a warrant, which make it difficult for parties, two and a half years later, to understand context, intent, and meaning with respect to the affiant's state of mind.

Misrepresenting forensic evidence in a homicide affidavit. Withholding your own subjective beliefs, which directly contradict the beliefs of other officers, which you have also falsely represented.

Asking to use a SWAT team when you do not have probable cause for an arrest outside a public university on a weekday in broad daylight, exposing many to risk. And we know the risks associated with the use of force and SWAT teams. Just recently, we had Breonna Taylor killed in her home because of these types of activities. Had Mr. Wondie made an inappropriate gesture or movement, he could have been killed.

Because Detectives Decker is a seasoned detective,

accountability always starts from the top with respect to our leaders. Laughing about the warrant process, using words like "creativity" as to the process undermines confidence in the system.

Holding this detective accountable empowers officers who do not take shortcuts, who follow the rules, and, more important, officers who want to be public servants in an environment that is currently hostile to them.

Judicial integrity, a little bit. That stands on the process that no warrant shall issue but upon probable cause supported by oath or affirmation. That's from the Fourth Amendment. From our finding, oath and affirmation has been a hallmark of the process. This is an ex parte process, which appears inconsistent with our adversarial system. Oath and affirmation represents honesty, transparency, and reliability, which are crucial to this system.

The public doesn't have access to this system on a day-to-day basis. Neither do defense lawyers. An exclusionary rule occupies a special space here. It protects the judiciary from being party to a deception. It protects prosecutors, who have to draft affidavits. And most important, it protects a core Fourth Amendment protection, which is the warrant clause.

The last thing is, exclusion is necessary, Your Honor, to inject the government's collective knowledge doctrine based on alternative probable cause, which knows no basis in law. That

theory is a means towards an end, an end which asks this court to ignore the deceptions, the misconduct, and, most important, the risk created not only towards my client's life by use of a SWAT team, but students and the public who were going about their business on the morning of December 6th, 2018.

Federal and state agents work towards a common end in this case. The evidence was clear.

We ask that this court exclude all evidence as a consequence of this warrant in the vehicle, on my client's person, all statements made by him, and the search of both residences.

Thank you.

THE COURT: Let's take a stretch break, counsel.

MS. BRIN: Your Honor, if I may just use the restroom as well?

THE COURT: Okay.

(Off the record.)

THE COURT: Please be seated.

We're going to take our recess at 2:45. I'm not asking you to stop. You can complete your argument, but I want to try and stay on track, to the extent that we can.

MR. OESTERLE: Thank you, Your Honor. I'm going to wait for Ms. Brin to return to the courtroom.

THE COURT: That's fine. We'll give her a little more time for a convenience break.

GOVERNMENT'S CLOSING ARGUMENT

MR. OESTERLE: Thank you, Your Honor.

Counsel, as he was closing his argument, raised a totality of circumstances in a way that goes beyond this case, really. Defense is arguing not just for the instances in the affidavit that have been put forth as being reckless or deliberately false, but other aspects of the affidavit, painting it with the broadest brush possible.

Into that totality of the argument, the defense also puts other actions in this case, including discovery issues. Into that totality argument, counsel also puts the conduct of Detective Decker and her fellow investigators and other aspects of the homicide investigation.

But that simply can't be the law for this issue. And while I respect and admire counsel's passion and zealous advocacy, and, in fact, agree with many of his final policy statements, that's not the issue before this court and should not color the court's analysis under the *Franks* doctrine.

The government would urge the court to return to the *Franks* doctrine and what's actually required, and focus on the affidavit that we've been discussing for the past two days.

The standard is very clear, and defense readily embraces their burden. That burden is a heavy one, and to prevail, the defense must prove, by clear evidence, that either Detective Decker either made deliberatively false statements, knowing and

intentionally, or made statements in reckless disregard for the truth, which has also been defined by the courts as, in fact, showing that Detective Decker entertained serious doubts as to the truth of her allegations.

The *Franks* doctrine, now in the Ninth Circuit, also applies to omissions, as the court is well aware, and has been briefed by the parties. And in that context, when we deal with omissions, under the *Franks* doctrine, suppression is available if Detective Decker intentionally or recklessly omitted facts found to be material to the finding of probable cause and did so with an intent to mislead.

Stripping away all the other claims of government misconduct, overreach noted by the defense, and focusing solely on the affidavit that was submitted by Detective Decker, the government submits this standard cannot be met in this case.

First, with respect to NIBIN, Detective Decker made a candid admission before this court. She acknowledged making a mistake. She overstated the evidentiary weight to be given to the NIBIN presumptive lead notification. Instead of quoting directly from the source document, she used language that she had used in the past, and she testified that others, in fact, in her department had used as well.

It was a mistake, an overstatement. It was not made with the intent to deceive. She was simply using language that she had been comfortable with and had not been challenged for in the

past.

Defense suggests that the government could have called other people to bolster Detective Decker. That would have been improper. The inquiry before this court is what Detective Decker believed. It is a subjective analysis, not objective. It doesn't matter what Sam Gonzalez thought. It mattered what Detective Decker had in her mind, and she was here to testify for this court.

As I said, she was candid about her understanding of NIBIN, and she was presented documents that included -- documents that she was recipient of, either directly or a copy was sent to her, explaining the NIBIN process. Many of those documents were reviewed earlier today with Mr. Noedel.

And I was going to go through each of those documents, but I really don't think it's necessary, given Mr. Noedel's testimony this morning.

What he confirmed, by his own testimony, was that professionals like Detective Decker do use the words "hit" and "match" interchangeably when describing the association that's set forth in a NIBIN lead notification. He acknowledged what Detective Decker's practice was, and then went a step further and admitted that NIBIN lead notification nomenclature is confusing.

Piecing together the evolution of the language found in the NIBIN lead notification, as the government did, and it was

reviewed again this morning, from 2015 to 2018 there was a transformation. It went from "hit," "lead," to "association." It was not unreasonable for Detective Decker to rely on that past experience with NIBIN lead notifications.

Yes, the language changed, but it also changed in a way that informed Ms. Decker that the confirmation process, the second step, was not necessary for a probable cause determination because language that had required that was removed from the NIBIN lead notification, as the exhibits presented.

The 2018 version, which was the version that communicated the NIBIN lead confirmation to Detective Decker, had removed the requirement that confirmation is required for showing of probable cause.

The language remained something of a standard language format in the cover memo, the cover email in this case from Sam Gonzalez, "If microscopic confirmation is needed," and Detective Decker testified that it was her understanding, and it was a reasonable understanding. She interpreted that as if, "if required," and her understanding was for trial, then she would seek the microscopic confirmation by contacting the lab. The language does not read, as counsel suggested, that if you have to prove probable cause, you have to get microscopic confirmation. That's not what the language says. It's not unreasonable.

And, more importantly, she did not use the language she did in the affidavit with an intent to deceive. It was a mistake. It was an overstatement. She owned it on the stand, and I think that goes to her credibility.

Again, we don't even need to necessarily give a hundred percent credence to that statement. We just need to recall Mr. Noedel's testimony this morning.

The self-described distinguished member of the leading professional organization for firearms and toolmark examiners acknowledged there's confusion. It's not unreasonable to then allow Detective Decker to share in some of that confusion.

So to summarize with respect to NIBIN, again, Detective acknowledged a mistake. There is no evidence or certainly clear proof that that was a deliberate falsehood intended to deceive Judge Richardson. There is no evidence of reckless disregard on her part to use the language she did with the intent to deceive Judge Richardson.

Courts have interpreted the reckless disregard standard to also mean, as I said earlier, that the affiant, in fact, entertained serious doubts as to the truth of the allegations. There was no evidence elicited that Detective Decker had any doubts as to how she characterized NIBIN, much less serious doubts.

And, again, suggesting that the government should have called Sam Gonzalez or others in her department to bolster or

verify the legitimacy or the genuineness of her belief flips the standard on its head. It's not the government's burden to do that. The government presented the affiant or made the affiant available. The affiant testified. That's what matters, what she believed and what her intent was.

With respect to the photo, much of defense's presentation with respect to the photo focused on how easily it would have been for Detective Decker to access other social media accounts and information to locate additional images that could have challenged her belief that the individual depicted in the group photo was Mr. Wondie.

But that's not the appropriate inquiry for this proceeding. The appropriate inquiry is whether she made an intentional false assertion that the person in the booking photo, Mr. Wondie, was the person depicted second to the left in the group photo.

The question is, did Detective Decker entertain serious doubts as to the truth of her belief? She testified that she did not. The defense has challenged that, but there is still no evidence in the record that, in fact, she had any doubts.

She sought out the advice of others. She also displayed the photograph -- she testified she displayed the photograph to other law enforcement. Defense may strongly disagree that that was adequate, but there is no standard set forth in the cases for what is considered to be adequate diligence.

The Ninth Circuit has found that a failure to investigate

fully is not evidence of an affiant's reckless disregard for the truth. As stated in the Ninth Circuit decision *U.S. v. Gourde*, 440 F.3d 1065, the benchmark is not what the FBI could have done. An affidavit may support probable cause even if the government fails to obtain potentially dispositive information.

Suggesting or putting on evidence that a more thorough investigation would have been appropriate, which was done in this case, is not a substitute for establishing intentional or reckless conduct on the part of the affiant.

The Ninth Circuit has repeatedly affirmed the denial of a *Franks* motion in circumstances analogous to those presented here in which the defendant claims that a more thorough investigation was warranted, particularly with respect to the photo.

And I would cite, for the court's benefit, two cases: *United States v. Huggins*, 299 F.3d 1039, where the court said, quote, Even assuming without deciding that such a duty of further inquiry may exist in some cases, and, as the defendant argues, a more thorough surveillance would have uncovered information that would have undermined a finding of probable cause, we think that the agent's decision not to conduct prolonged surveillance certainly was not made with the degree of recklessly necessary to warrant suppression.

The second case is *United States v. Burns*, at 816 F.2d 1354, where the court stated, quote, While further investigation by the officers might have revealed that the chemical bottle

obtained by the woman at Chem Lab is not unique to ephedrine, the most that could be said of the officer's failure to further investigate is that they were negligent.

The same applies in this case.

Absent evidence, clear proof that Detective Decker entertained serious doubts as to the truth of her representation that the photos were of the same person, the most that can be said is that she was negligent.

Finally, with respect to the propensity for violence claim, or the inclusion of the "propensity for violence" term in the affidavit, instead of the term apparently used by Officer Averett, which is the "potential for violence," the same could be said.

What Detective Decker represented in her affidavit was that this was a communication given to her by Officer Averett. She does not recall why the word "propensity" appears and not the word "potential," as is in Officer Averett's email.

But, again, the mere fact it's different language does not satisfy the burden that that substitution was made with the intent to deceive or with reckless disregard for the truth of the matter.

And the court doesn't have to rely solely on the government's representation of that. With respect to the "propensity" language, I would invite the court to look at the paragraph immediately following that; language that has not, to

the best of my recollection, been challenged by the defense in this case.

If it's important to a finding of probable cause in this case, the government submits that this language, even if the court chooses to excise the "propensity for violence" term because the court believes it was either recklessly or deliberately included with an intent to deceive, this language, which, again, the government believes was not challenged, should stand as a sufficient basis for supporting Detective Decker's request for a warrant in this case.

Again, as representations made in very, very close proximity to the date that this affidavit was submitted in connection with the application for the warrant, showing that, in fact, Mr. Wondie, through his representations to a UC, had represented that he -- and you have to drop a pretty reasonable inference that he had a gun, based on what he was communicating to the UC.

That addresses the three principle claims. Again, focusing solely on the affidavit, which is the task before the court, it is not to apply the broad brush of allegations regarding both the homicide investigation, the federal prosecution, and other external events to somehow color what Detective Decker's intent was.

The government would urge the court to remain focused on that question and that question alone in determining whether

there was sufficient probable cause to uphold the warrant, and, in fact, that Detective Decker did not make deliberate false statements, she did not make statements in reckless disregard for the truth. None of that was done with an intent to deceive the court.

What's important is what she had in her mind.

Two weeks ago, in response to questions asked of Special Agent Dkane about whether he would agree that the photos matched, defense raised an objection, and the court sustained it. And in the objection, counsel said, "It doesn't matter what Special Agent Dkane thinks. What matters is what Detective Decker thinks." And that is exactly what the government asks the court to do in this case, and deny the motion.

Thank you.

THE COURT: We'll take our afternoon recess at this time. We'll resume in 15 minutes.

(Court in recess 2:44 p.m. to 3:03 p.m.)

THE COURT: Counsel for the government has completed their argument. Counsel for the defense?

DEFENSE'S REBUTTAL ARGUMENT

MR. HAMOUDI: Thank you, Your Honor.

The government observed that our request for relief encompassed a large -- requested relief outside the scope of what's at issue in the *Franks* motion. That's not the case.

The exclusionary rule here meets two purposes: One, if the

court finds that there is a warrantless arrest and exclusion needs to be used, then the purpose of the exclusionary rule should meet the purposes of what happened with respect to the arrest, which was use of a SWAT team without probable cause. So a lot of the comments that I made about placing my client's life in danger and the public in danger is with respect to that issue.

With respect to the *Franks* motion, the court cannot ignore that the officers' actions, for the exclusionary rule purpose, has downstream effects. It would treat the behavior as though it existed in a vacuum.

Now, that's a separate part of the analysis, which is -- and, obviously, the court is going to conduct the analysis however it pleases. The court may conduct an analysis where it's thinking about the exclusionary rule and the values that it would serve in this case, and then address the affidavit and look at the four corners of the affidavit and focus on the misrepresentations, or vice versa, but we ask that the court do consider what purpose the exclusionary rule would serve in the context of the case if relief is granted, and that's what we're speaking to.

We also would add, Your Honor, that the government seems to indicate that Detective Decker's language used with respect to the NIBIN was reasonable for her to rely on this old language of "hit." And this is not about relying on the language of "hit"

in emails exchanged and received. This is about the language used in an affidavit, a sworn affidavit under penalty of perjury to a judge, who is not your fellow law enforcement colleague, who is not just emails being exchanged over the computer. This is about filling out an affidavit. And so when we asked or posed we did not receive any affidavits from Detective Decker in the past, from 2016, when this old language was being used, indicating that that was her understanding of NIBIN.

And I would particularly like to focus the court's attention to Exhibit 136-6, 136-16, 136-21, 136-27, and even the government's 75-2, and these are all NIBIN leads from 2017, and consistently, in all of these leads, the language included is, "NIBIN leads cannot be utilized for the establishment of probable cause for warrants or for any court-related purposes until evidence has been confirmed by microscopic examination." And that language in 2018 is included in Gonzalez' email saying, "If a microscopic confirmation is required for arrests, warrants, et cetera, please contact WSP Crime Lab."

Now, if you want to even ignore this language, the problem here is -- bringing up the first page of 135, the email -- Gonzalez is saying, "The cartridge casings from KCSO appear to correspond, as established by the NIBIN database." It's the "appear to correspond." There is no use of the one -- that this is connected to the firearm. They're talking about the casings. That's the most problematic aspect of what happened in the

affidavit.

The issue "if a microscopic confirmation is required" is simply flavor to add to that as an indication, an alert, "be careful about how this is prepared or included in an affidavit or a warrant." That's what that means.

To accept the government's position that the detective was reasonably mistaken would be as though a police officer who works at a police department is applying a standard in 2016, and then the police department changes that standard in 2017, and then in 2018 the police officer makes a decision, and that decision is of consequence because it's contrary to the 2017 policy, and the police officer proclaims, "I was applying 2016," that's not reasonable. That's simply not reasonable in the context of just being a police officer. Now we're talking in the context of an affidavit that is being prepared and signed by a police officer with 30 years of experience to a judge.

On the issue of Mr. Noedel testifying about their being confusion, he was referring to this old language. And if the government does not want other subjective beliefs of individuals to be associated with Detective Decker, then the same rule should then apply, and what Mr. Noedel's testimony is about someone being confused should equally not be applied to Detective Decker.

Detective Decker is responsible for her affidavits, and she has a lot of experience, and if she was confused, she should

have just sourced it and attached the NIBIN lead to the affidavit -- and she said she could have. There was nothing preventing her from doing that -- so that the judge could have the information in her hand.

And we are not, with respect to the photo, demanding that some new and burdensome duty to inquire be placed on police officers. What we're talking about there is what she had in her possession the whole time. The documents, the emails, the videos that we covered with her in her testimony, she had those in her files; she just decided not to look at them when she made her assertion. That allows the court to infer a reckless disregard for the truth.

The government spoke briefly about this meeting, and no testimony was offered by any of these individuals about what was said in this meeting, but I would just add what the government elicited was that the affidavit was presented in this meeting, and the picture and the booking photo in the affidavit, including her statement that "I believe this is Mr. Wondie." So she's already asserted her belief. It's not as if she came into this meeting and was like, "Officers, let's get together and figure out who this person is." There's no testimony to that effect.

Ultimately, Your Honor, the four corners of the affidavit are going to control what happens here, and what I believe Mr. Oesterle is suggesting is that I think if we excise the

falsehoods in this affidavit, if we just look at this affidavit without the falsehoods and ask ourselves whether probable cause existed to search my client's home and residence, I don't think we satisfy that.

And if we go through and we excise, on 134-5, under the summary, "Forensic examination has established that shell casings recovered from the scene match the gun known to be owned by Gizachew Wondie." If we go to 134-6, paragraph 5, we write, "Detectives learned, through NIBIN testing, a casing was linked to two Seattle Police cases," rather than, "Detectives learned through NIBIN testing the firearm used to shoot and kill Amarah Riley was the same firearm linked to two Seattle Police cases."

If we then go to 134-8, the bottom, and we excise "the test results link conclusively," we remove "conclusively," "to the shell casings collected from the Amarah Riley murder scene on 9/19/2018," and we excise "the Gizachew Wondie Smith & Wesson .40 caliber firearm described above," we excise that last sentence, and we move forward to page 134-10, and we -- at the bottom, we excise, "I believe the male shown second from the left in the back is Gizachew Wondie," we excise that, and then we move forward to the next page, we excise, "propensity for violence," and put in "potential for violence," and then if we go to -- I apologize -- 134-8, under the heading, "The May 28th, 2018, incident," we include that "there was a suspect that was not Mr. Wondie, who was viewed by witness to be shooting at a

moving vehicle," and we put in the appropriate context with respect to suspect's history, if we do all that, Your Honor, probable cause does not exist to search my client's home and his vehicle for the Smith & Wesson firearm.

Thank you, Your Honor.

THE COURT: All right. Thank you, counsel.

Counsel, we've come to the conclusion of the evidentiary portion of this case, as well as argument of counsel. The matters have all been submitted to the court for consideration. I've given you the date of July 1 at 1:30. If I can get a written order done, counsel, before that date, I'll certainly enter the written order, and you will not have to be here, but I think you should plan to be here otherwise.

Counsel for the government, do you know of any reason why you cannot be here for the date and time given by the court?

MS. BECKER: Not at this time.

THE COURT: Counsel for the defense?

MR. HAMOUDI: Not at this time, Your Honor.

THE COURT: All right. Then if there is nothing further, thank you. We'll be in recess.

(Proceedings concluded at 3:16 p.m.)

C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 12th day of July 2021.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR
Official Court Reporter